90-1367

No. 90-___

Supreme Court, U.S.
FILED
MAR 1 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,
Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., *et al.*,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS W. KIRBY*
RICHARD C. LOWERY
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

PATRICK J. HAGAN
KINCAID, GIANUNZIO, CAUDLE
& HUBERT, P.C.
Post Office Box 1828
Oakland, CA 94604-0828

Attorneys for Petitioner
Kaiser Cement Corporation

* *Counsel of Record*

March 1, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

CONTENTS

Page

Opinions of the Courts Below

A. Opinions of the United States Court of Appeals for the Third Circuit, December 13, 1990 (921 F.2d 1330) 1a

B. Opinion of the United States District Court for the Eastern District of Pennsylvania, February 16, 1990 ..... 21a

Judgments of the Courts Below

C. Judgment of the United States Court of Appeals for the Third Circuit 27a

D. Judgment of the United States District Court for the Eastern District of Pennsylvania 30a

Related Opinions of the Courts Below

E. Opinions of the United States Court of Appeals for the Third Circuit, December 13, 1990 (921 F.2d 1310) 34a

F. Opinion of the United States District Court for the Eastern District of Pennsylvania, November 14, 1989 ..... 77a

Others

G. Order of the United States Court of Appeals for the Third Circuit denying petition for rehearing and suggestion for rehearing *en banc*, January 9, 1991 ..... 83a

H. United States District Court for the Eastern District of Pennsylvania Notice of Class Action Litigation Relating to School Asbestos Claims, September 21, 1987 ..... 87a

I. United States District Court for the Eastern District of Pennsylvania Notice of Proposed Settlement of Class Action With Lac D'Amiante Du Quebec, Ltee and Settlement Hearing, December 28, 1989 ..... 94a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1247 & 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and NORTHEASTERN SCHOOL DISTRICT

Appellees,

vs.

LAKE ASBESTOS OF QUEBEC, LTD.
THE CELOTEX CORPORATION, RAYMARK
INDUSTRIES, INC., UNION CARBIDE CORP.,
ASBESTOSPRAY CORP.,
SPRAYO-FLAKE COMPANY,
NATIONAL GYPSUM CO., SPRAYED INSULATION,
INC., ASBESTOS FIBRES INC.,
DANA CORPORATION,
U.S. GYPSUM, U.S. MINERAL
PRODUCTS COMPANY,
SPRAYON INSULATION & ACOUSTICS, INC.,
SPRAYON RESEARCH CORP., KEENE CORP.,
WORBEN CO., INC.,
WILKIN INSULATION COMPANY,
W.R. GRACE & CO.,
OWENS CORNING FIBERGLAS CORPORATION,
STANDARD INSULATION, INC.,
NORTH AMERICAN ASBESTOS CORPORATION,
CASSIAR RESOURCES LTD.,
BELL ASBESTOS MINES, LTD.,
ASBESTOS CORPORATION LIMITED,
SOUTHERN TEXTILE CORP., OWENS-ILLINOIS,
INC., TURNER & NEWELL LIMITED, THE
FLINTKOTE CO., FIBREBOARD CORPORATION,
GAF CORP., UNIROYAL, INC., CAPE ASBESTOS,
PFIZER, INC., KAISER CEMENT CORPORATION,
BES-TEX, INC., GEORGIA-PACIFIC CORP.

Kaiser Cement Corporation,
Appellant No. 90-1247

United States Gypsum Company,
Appellant No. 90-1248

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 0313 2, 83 00268)

Argued: Wednesday, September 19, 1990

Before: SCIRICA, COWEN and ALDISERT,
Circuit Judges.

(Filed December 13, 1990)

Thomas Kirby, Esq. (Argued)
WILEY, REIN & FIELDING
1776 K Street. N.W.
Washington, D.C. 20006

COUNSEL FOR APPELLANTS

John H. Lewis, Jr., Esq.
Joseph B. G. Fay, Esq.
J. Gordon Cooney, Jr., Esq.
Andrew D. Leipold, Esq.
Richard H. McAdams, Esq.
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

COUNSEL FOR APPELLANT,
United States Gypsum Co.

Daniel J. Ryan, Jr., Esq.
MARSHALL, DENNEHEY, WARNER, COLEMAN & COGGIN
1515 Locust Street
Philadelphia, PA 19102

Patrick J. Hagan, Esq.
KINCAID, GIANUNZIO, CAUDLE & HUBERT
200 Webster Street
Suite 200
Oakland, CA 94604-0828

COUNSEL FOR APPELLANT,
Kaiser Cement Corp.

Herbert B. Newberg, Esq.
Harvey S. Kronfeld, Esq.
Gerald E. Wallerstein, Esq.
Sandra L. Duggan, Esq.
HERBERT B. NEWBERG, ESQ., P.C.
227 South Sixth Street
Lippincott Building 2nd Floor
Suite 200
Philadelphia, PA 19106

David Berger, Esq. (Argued)
Harold Berger, Esq.
Warren Mulloy, Esq.
Howard Langer, Esq.
Thomas F. Hughes, Esq.
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103

COUNSEL FOR APPELLEES,
School District of
Lancaster
Manheim Township School
District
Board of Education of the
Memphis City Schools
Barnwell School District

Molly S. Boast, Esq. (Argued)
Jay G. Safer, Esq.
Frederick B. Lacey, Esq.
LeBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, NY 10022

Edward W. Madeira, Jr., Esq.
Richard W. Foltz, Jr., Esq.
Matthew H. Adler, Esq.
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
Philadelphia, PA 19103-2799

COUNSEL FOR APPELLEE,
Lake Asbestos Quebec

Charles Alan Wright, Esq.
727 East 26th Street
Austin, TX 78705

OF COUNSEL TO APPELLEES

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

Here we are confronted with an appeal by two non-settling defendants in a nationwide class action asbestos action who unsuccessfully contested a settlement agreement entered into by another defendant in the district court. We conclude that these non-settling defendants lack standing to challenge the agreement. Accordingly, we affirm the judgment of the district court.

I.

In 1984, the district court certified a nationwide opt-out class of school districts seeking to recover from approximately fifty defendants. Three defendants made offers to settle: Owens-Illinois, Inc., Proko Industries, and Lake Asbestos of Quebec, Ltd. ("LAQ"). The district court approved the OI/Proko settlement, over objections by certain defendants. The court ruled that such non-settling defendants lacked standing to object to a settlement with a co-defendant.

On November 27, 1989, the district court preliminarily approved a one million dollar settlement with LAQ; it also approved a corresponding form of notice submitted by the class plaintiffs, directing notice to be sent by first class mail. The district court concluded that the settlement with LAQ was fair, reasonable, adequate, and proper, and entered final judgment on the settlement as to the class defined in the settlement agreement. Two non-settling defendants, Kaiser Cement and United States Gypsum, appeal the LAQ settlement agreement.

In the underlying litigation a question was raised as to jurisdiction. We determined in *In re School Asbestos Litig.*,

___ F.2d ___ (3d Cir. 1990) (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (filed on this date) that the defendant petitioners had not met their burden of showing a "clear and indisputable lack of subject matter jurisdiction in the district court." Thus, jurisdiction in the trial court was proper based on 28 U.S.C. § 1332. Jurisdiction on appeal is proper based on 28 U.S.C. § 1291. Appeal was timely filed under F.R.A.P. 4(a).

Review of the essentially legal question of standing is plenary. *PIRG of New Jersey v. E.P.A.*, 913 F.2d 64 (3d Cir. 1990).

II.

The district court held that Kaiser and United States Gypsum lacked standing to contest the LAQ agreement:

> As a general rule, a non-settling defendant is not prejudiced by the settlement and therefore has no standing to contest the settlement. *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979). There are, however, two recognized exceptions to this general rule. A non-settling defendant can object to a settlement: 1) when the terms of the settlement preclude the non-settling defendant from seeking indemnification from the settling defendant, and 2) when the settlement affects the rights of the non-settling defendant. *In Re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979); *In Re Fine Paper Litigation*, 632 F.2d 1081 (3d Cir. 1980).

Pretrial Order No. 66; Appellees' Brief at 7. The court recognized the general exception to the rule denying standing when "non-settling defendants are precluded

from seeking indemnification from settling defendants" and rejected appellant Kaiser Cement's claim that its right to indemnification or contribution was compromised. Memorandum and Order of February 16, 1990 at 6; App. at 809.

III.

Kaiser and U.S. Gypsum argue on appeal that their rights are not adequately protected by the settlement agreement and that they have standing to raise issues arising from the LAQ settlement. Basically, their argument is that the settlement agreement bars them from pursuing claims for contribution or indemnity against LAQ. *See* Brief for Kaiser Cement Corp. at 37-43; Brief for U.S. Gypsum at 14-20. They contend that their dismissal by the district court leaves them out in the cold, unable to test subject matter jurisdiction and the adequacy of the procedures leading to final judgment. They argue that they should be given the opportunity to assert these claims in order to preserve their rights to contribution or to establish judgment reduction rights against class members in this or subsequent litigation.

The appellees counter that these protestations are without merit. They argue that appellants have failed to demonstrate legal prejudice that might give them standing to contest the LAQ settlement and, lacking this, their "lost opportunity" argument cannot be asserted and their appeal should be dismissed.

It is clear that the appellants bear the burden of demonstrating that they have standing. *See e.g., Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Baker v. Carr*, 369 U.S. 186, 204 (1961). To establish standing to appeal a settlement, a non-settling defendant may not merely claim an interest in the lawsuit but must show some cognizable prejudice to a legal relationship between it and the settling parties. *In re Fine*

Paper Litig. State of Wash., 632 F.2d 1081, 1087 (3d Cir. 1980) (non-settling party may not object to settlement terms that do not affects its own rights); *Utility Contractor's Ass'n of New Jersey v. Toops*, 507 F.2d 83, 85 (3d Cir. 1975) (non-settling parties have no standing to object to partial settlement where they demonstrated no interference with any legal relationship between them and the settling parties), *see also Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987); *Quad /Graphics, Inc. v. Fass*, 724 F.2d 1230 (7th Cir. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 614 F.2d 111 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981). The appellants assert that standing is established because their rights to contribution or indemnity are compromised by the LAQ settlement. We disagree.

IV.

The agreement with LAQ specifically provides that, in the event any defendant obtains a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against such defendant will be reduced by any "amount percentage or share of such judgment attributable to LAQ":

> The Class shall reduce any judgment it obtains against any defendant by the amount, percentage or share of such judgment attributable to LAQ so as to bar, discharge and release under applicable law any claims for contribution or indemnity against LAQ arising from or related to the Claims. In the event that the Class obtains a judgment (including pursuant to a settlement agreement) against one or more of those defendants, obtains a judgment over, in whole or in part,

> against one or more of those defendants in the Litigation and any of those defendants obtains a judgment over, in whole or in part, against LAQ for contribution or indemnity, then the Class will be required to reduce or remit any judgment or portion thereof obtained from those defendants by the amount of the judgment over against LAQ.

Paragraph 12 of Settlement Agreement; App. at 178. In his text on class actions, Herbert B. Newberg, counsel for plaintiff-appellees here, examined this scenario and concluded:

> When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law or, in the absence of statute, by a reduction in the judgment against non-settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, non-settling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement. See § 12.42A.

2 *Newberg on Class Actions* § 11.54 n.472 (2d ed. 1990 Pocket Part at 103). We accept these reasons and find them consistent with our policy of encouraging settlement of complex litigation that otherwise could linger for years. *See also Waller v. Financial Corp.*

of Am., 828 F.2d 579 (9th Cir. 1987); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979).

The settlement agreement in this case specifically recognizes the existence of indemnification and contribution rights of non-settling defendants and the Order approving the settlement contains no ruling purporting to limit any claims non-settling defendants may have. Accordingly, appellants lack standing. We, therefore, do not reach the issue of whether adequate procedures were followed in the settlement approval process. *See In re Beef Industry Antitrust Litig.*, 607 F.2d at 172.

V.

The judgment of the district court will be affirmed.

Cowen, *Circuit Judge*, dissenting.

This appeal arises from a final judgment entered pursuant to a partial settlement agreement between one class action defendant and the plaintiff class under Fed. R. Civ. P. 23(c)(3) and Fed. R. Civ. P. 54(b) in three consolidated class actions filed in the United States District Court for the Eastern District of Pennsylvania. The final order dismisses with prejudice the claims of all class members against defendant Lac D'Amiante Du Quebec, Ltee ("LAQ"). It also purports to bind members of the plaintiff class to "adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ" App. at 804.

Kaiser Cement Corporation and United States Gypsum Company (the "non-settling defendants") object to the settlement arguing that it prejudices the rights of non-settling defendants. The district court disagreed and held that their rights are not prejudiced and that the non-settling defendants lack standing to challenge the adequacy and fairness of the settlement. The majority opinion affirms.

Because I believe that the district court lacks jurisdiction over these consolidated Rule 23(b)(3) class action cases and that the settlement prejudices the rights of non-settling defendants, I respectfully dissent.

I.

For the reasons set forth in my dissent in *In re School Asbestos Litig.*, ___ F.2d ___ (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (3d Cir. 1990) (Cowen, J., dissenting) (filed on this date), I believe that the district court lacks subject matter jurisdiction in the underlying litigation. Accordingly, I would remand to the district court to vacate the judgment of the district court and dismiss the case.

Even if the district court did have jurisdiction, it would nevertheless be inappropriate to enter final judgment with respect to LAQ because the district court has not yet determined the identity of the plaintiff class.

A.

Rule 23(c)(3) requires that a final judgment in a Rule 23(b)(3) class action "include and specify or describe" those whom the court finds to be members of the class.[1] The district court has not yet determined which plaintiffs are actually part of this nation-wide class action suit, because all parties acknowledge that some members of the plaintiff class have claims for less than the minimum amount in controversy required by former 28 U.S.C.A. § 1332(a).

Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) requires that "[e]ach plaintiff in a Rule 23(b)(3) class

[1] Rule 23(c)(3) reads in relevant part:

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

action . . . satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case. . . ." In order to avoid dismissing the entire class action now, as *Zahn* requires, the district court has vowed in Pre-Trial Order No. 197 to "cure" the jurisdictional deficiencies after trial by entering final judgment only on behalf of plaintiffs who have proven claims meeting the jurisdictional minimum. App. at 542-543.

As I discuss in my dissent in *In re School Asbestos Litig.*, ___ F.2d ___ (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (Cowen, J., dissenting) (filed on this date), this approach is flawed. Nevertheless, the majority in that case allows the district court to proceed to the merits without first curing the acknowledged jurisdictional defects. *Id.*, maj. typescript op. at 12-17. Therefore, the subject matter jurisdiction of the district court, if it exists at all, is predicated on Pre-Trial Order No. 197, indicating that the district court will not enter final judgment with respect to any plaintiff who fails to establish a jurisdictionally sufficient claim. App. at 542-543. In other words, the identity of the plaintiff class will not be determined until a damages-stage trial. That is precisely why the district court may not enter a final judgment against LAQ now: the entry of final judgment with respect to a class action defendant before determining the identity of the plaintiff class violates the plain language of Rule 23(c)(3) which requires that the judgment "include and specify or describe" those whom the court finds to be members of the class.

B.

Even if Rule 23(c)(3) did not require that the court identify the members of the plaintiff class before the entry of final judgment, precedent mandates that the district court resolve questions as to its jurisdiction before the entry of final judgment. *See Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 905 F.2d 42, 45 (3d Cir. 1990) ("[A]

federal court is bound to consider its own jurisdiction preliminary to consideration of the merits.") (citations omitted); *Pacific Intermountain Express Co. v. Hawaii Plastics Corp.*, 528 F.2d 911, 912 (3d Cir. 1976) (per curiam) ("a district court is not permitted to dispose of a case against a party on non-jurisdictional grounds until it first determines it has jurisdiction over such party.")

Both *Wausau* and *Hawaii Plastics* involved declaratory judgment actions where the district courts disposed of the cases as an exercise of discretion under the Declaratory Judgment Act before they resolved the pending challenges to the district courts' jurisdiction. In both cases we reversed.

In *Wausau*, we explained that disposition of a case "amounts to the exercise . . . of dominion over [the] matter, clearly presupposing . . . subject matter jurisdiction in the first instance. *Wausau*, 905 F.2d at 45. Likewise, in *Hawaii Plastics* (where both the court's personal and subject matter jurisdiction were challenged), we held that a court may not dismiss a case on non-jurisdictional grounds until it determines that it has jurisdiction. *Hawaii Plastics*, 528 F.2d at 912.

In the case at bar, the district court considered whether it had subject matter jurisdiction and concluded that it did—provisionally. That is, the district court determined that it could exercise jurisdiction over the consolidated case, *as long as* it entered no final judgment in favor of a plaintiff with a jurisdictionally insufficient claim. Entry of final judgment before identifying which plaintiffs must be dismissed undermines the only basis on which the district court can conceivably maintain jurisdiction over this case. To avoid disposing of this case on non-jurisdictional grounds before the district court "cures" the acknowledged jurisdictional defects, I would require that the district court postpone the entry of final judgment against LAQ until it first determines that it has jurisdiction over

every plaintiff who will share in the judgment, as required by *Zahn*, 414 U.S. 291 and Rule 23(c)(3).

II.

The majority opinion declines to reach the question whether the entry of final judgment in this case is proper on the grounds that the non-settling defendants lack standing to challenge the settlement agreement. I disagree with this conclusion. I do, however, agree with the majority's statement of the law in Section III with respect to standing: a non-settling defendant "must show some cognizable prejudice to a legal relationship between it and the settling parties." Maj. typescript op. at 8. I also agree that this test is met (1) when the terms of the settlement preclude the non-settling defendant from seeking contribution or indemnification from the settling defendant, and (2) when the settlement otherwise affects the rights of the non-settling defendant. Maj. typescript op. at 6. I part company with the majority only in its conclusion that the non-settling defendants have failed to meet the "legal prejudice" test in this case.

A.

The parties agree and the majority apparently recognizes that the non-settling defendants *will* be prejudiced by the LAQ settlement. The non-settling defendants will be prejudiced because in many jurisdictions, a defendant's good faith settlement (such as the settlement of LAQ in this case) extinguishes contribution and indemnity rights of joint tortfeasors. *See Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796, 803-804 (W. Va. 1990) (collecting cases); *Lowe v. Norfolk & Western Ry. Co.*, 753 S.W.2d 891 894-95 (Mo. 1988) (en banc). The effect will be that the non-settling defendants will not be entitled under the law of many jurisdictions to obtain a reduced judgment against themselves for the

share or percentage of the judgment attributable to the conduct of LAQ.[2] Indeed, LAQ has conceded that "the settlement may have the effect, under applicable law, of barring non-settling defendants from seeking contribution or indemnity from LAQ for certain Class members' claims." App. at 656.

The settlement agreement with LAQ seeks to vitiate this prejudice by including a provision stating that any judgment for contribution that a non-settling defendant obtains against LAQ will be satisfied by a reduction from that non-settling defendant's liability to the prevailing plaintiff class.[3] In essence, the plaintiff class has agreed

---

[2] I Realize that in some states this prejudice will be mitigated by a statutory by the non settling defendant to receive a set-off in the judgment against it. *See* 2 *Newberg on Class Actions* § 12.42A Supp. at 124-25 (2D ed. Supp. 1990) ("Twenty-two states have adopted some form of 'settlement bar statute.' These statutes permit settling defendants to escape cross- and third-party claims for contribution by granting nonsettling joint tortfeasor codefendants some form of offset rights in any future judgment by the settling plaintiff against them."). Even in these states, the non-settling defendants may be prejudiced depending on which method of off-set the state uses: *pro tanto* (a reduction in the verdict by the amount that the settling defendant already paid—which could be less than that defendant's proportionate liability, which in turn would leave the non-settling defendants liable for more than their fair share); or *pro rata* (a reduction in the verdict by that proportion of the judgment that was attributable to the settling defendant). In states that have *pro tanto* settlement bar statutes, the non-settling defendants are prejudiced by the lost opportunity either to get contribution from the settling defendant or to get a *pro rata* set-off from the judgment against them.

[3] The settlement agreement provides,

> The Class shall reduce any judgment it obtains against any defendant by the amount, percentage or share of such judgment attributable to LAQ so as to bar, discharge and release under applicable law any claims for contribution or indemnity against LAQ arising from or related to the Claims. In the event that the Class obtains a judgment (including pursuant to a settlement agreement) against one or more defendants in the Litigation and

as part of the settlement with LAQ that it will reduce from any judgment it obtains against a non-settling defendant any liability LAQ has to the non-settling defendant as a result of LAQ being a joint tortfeasor.

The determinative question is whether LAQ and the plaintiffs can defeat the non-settling defendants' standing to challenge a settlement agreement which prejudices their rights merely by including a provision in the settlement agreement that plaintiffs will reduce their judgment against the non-settling defendants by the amount of the contribution judgment against LAQ. I believe that the inclusion of such a provision cannot defeat the non-settling defendants' standing for two reasons: first, there is no precedent for it; and second, there is no guarantee that this right to a set-off will be enforceable against the plaintiff class in the event the settlement agreement were later found to be unfair, inadequate, or entered into pursuant to an inadequate procedure. In short, a non-settling defendant could find itself cut off under state law from its rights of indemnity or contribution against LAQ by the existence of a good faith settlement agreement between LAQ and the plaintiff class, and yet unable to enforce the right to a reduced judgment that it purportedly received in exchange.

B.

The majority has cited only one authority for the proposition that a provision in a settlement agreement can defeat a non-settling defendants' standing. That sole authority is the 1990 pocket part of Herbert B. Newberg's

---

any of those defendants obtains a judgment over, in whole or in part, against LAQ for contribution or indemnity, then the Class may be required to reduce or remit any judgment or portion thereof obtained from those defendants by the amount of the judgment over against LAQ.

Paragraph 12 of the Settlement Agreement, App. at 178.

treatise on class actions. 2 *Newberg on Class Actions* § 11.54 n.261 (2d ed. 1990 Supp.).[4] The pocket part cites no court or other authority for its statement.

Mr. Newberg is a paid advocate, not a disinterested scholar. He entered an appearance as co-lead counsel in this case on May 10, 1984. He signed the briefs on this appeal and argued one of the related cases at oral argument. Under the circumstances, the assertion in his treatise, which he added while this case was pending, must be treated like the partisan opinion of a paid advocate. I am at a loss to understand why the majority has found it persuasive and has relied on it as the sole authority for the proposition that a plaintiff can defeat a non-settling defendant's standing by such a provision in the settlement agreement. In the 1985 edition of his treatise, Mr. Newberg recognized no limitation to the general rule that "non-settling defendants . . . may object to any terms [in a settlement] that preclude them from seeking indemnification from the settling defendants." 2 *Newberg on Class Actions* § 11.54 (2d ed. 1985) (footnotes omitted).

C.

The non-settling defendants raise several grounds for asserting that the settlement agreement might not bind

---

[4] Mr. Newberg writes:

> When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law, or in the absence of statute, by a reduction in the judgment against non-settling defendants by the amount of any contribution judgment against settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, nonsettling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement. See § 12.42A.

2 *Newberg on Class Actions* § 11.54 n.261 (2d ed. 1990 Supp.).

the plaintiff class. Essentially, the non-settling defendants argue that the settlement notice mailed to the class members was not sufficient to enable a class member to judge the settlement's reasonableness. As a result, the non-settling defendants are concerned that they will not be able to enforce the settlement agreement, but will nevertheless have lost their rights to contribution or indemnity under the laws of some jurisdictions.

The first problem with the notice mailed to class members is that it did not disclose that there was severe doubt regarding the district court's subject matter jurisdiction. There are 35,000 institutions which receive notice regarding the class action. The court does not have jurisdiction over all of them. None of the class members, however, have been informed that their rights are not being litigated in the class action. Quite the contrary, each class member has every reason to believe that not only are its rights being adjudicated, but that it cannot seek to recover damages on its own because the federal class action is the exclusive forum for resolving the asbestos in schools liability issues. In the meantime, some of those class members (perhaps even a majority) will not only fail to share in the settlement, but also lose their ability to pursue relief separately since the applicable statutes of limitation will eventually expire. Accordingly, the class members who received notice of the partial settlement were unable to assess the risks of agreeing to the settlement and were unable to protect themselves by objecting.

The second reason that the settlement notice was insufficient is that it failed to explain the significance of the release that the class gave to LAQ. There is no limitation in the amount that the plaintiff class has agreed to setoff. It is consequently possible that the non-settling defendants will have contribution or indemnity claims against LAQ that exceed the amount LAQ has paid to settle its liability in this case. The plaintiff class members have never been informed of this possibility and so were

unable to assess the risks of not objecting to the settlement with LAQ.

Finally, the settlement notice was inadequate because it was not mailed to all members of the class as required by Rule 23(e) and Procedural Due Process. *See Girsh v. Jepson*, 521 F.2d 153, 158 (3d Cir. 1975). The class is defined as all entities that "own or operate in whole or in part" any public or private elementary and secondary educational facility, as defined in 20 U.S.C.A. § 2854(a)(10) (1982) (current version at 20 U.S.C.A. § 2891(12) (1990)). App. at 153. Notice has only been sent to public and private schools, and not to any non-school private party or state agency. App. at 157. In addition, no notice has ever been sent to any school in Puerto Rico, Guam, American Samoa, the virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, although all these areas fall within the statutory definition invoked in the class definition. *See* 20 U.S.C.A. § 2854(a)(10), (16) (1982) (current version at 20 U.S.C.A. § 2891(12), (22) (1990). *See also* App. at 153. In other words, plaintiffs have failed to notify some parties that are entitled to receive notice of the class action proceeding, since they are ostensibly members of the plaintiff class.

We have previously held that where "notice was fatally defective, all subsequent proceedings pertaining to the settlement are devoid of validity and all settlement orders issued pursuant to those proceedings will therefore be vacated." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 834 (3d Cir. 1973). In other words, the non-settling defendants could find that they have received an unenforceable right to a diminution of a judgment in favor of the plaintiff class in exchange for their lost rights to indemnity and contribution from the settling defendant.

Even if there is no merit to the claims of the non-settling defendants that the notice was insufficient for the reasons discussed above, I do not think that it comports

with Due Process to allow the plaintiffs and LAQ to shift the risk of the unenforceability of the settlement agreement to the non-settling defendants. It is patently unfair to place the non-settling defendants in the position in which they now find themselves—having to accept a potentially unenforceable right to set-off in exchange for the contribution or indemnity remedies they would otherwise have.

III.

Because I believe that the district court lacks subject matter jurisdiction, I would remand to the district court to vacate the judgment and dismiss the case. Even if the district court did have subject matter jurisdiction, the entry of final judgment in this case is inappropriate: the district court has not yet identified the plaintiffs who comprise the class that was certified in these consolidated actions, in violation of the plain language of Rule 23(c)(3). Even without Rule 23(c)(3), precedent requires that we resolve jurisdictional questions before we dispose of a case on the merits. Here the district court must dismiss those plaintiffs with jurisdictionally insufficient or inappropriate claims before it can enter final judgment against any defendant. In addition, I believe that the non-settling defendants have standing to challenge the settlement agreement since it prejudices their rights in a number of ways. I would vacate the judgment and remand to dismiss the class action consistent with my dissent in *In re School Asbestos Litig.*, ___ F.2d ___ (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (Cowen, J., dissenting).

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

FILED

FEB 20 1990

MICHAEL E. KUNZ, Clerk

MEMORANDUM AND ORDER

J. M. KELLY, J. FEBRUARY 16, 1990

The plaintiffs and Lac D'Amiante du Quebec, Ltee (LAQ), one of 50 defendants remaining in this action, reached an agreement for partial settlement of this matter on March 31, 1989. The terms of the agreement call for LAQ to pay $1,000,000.00 (one million dollars) to the class. In exchange, the class members will dismiss their claims against LAQ with prejudice and agree to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ. On November 22, 1989, the court preliminarily approved settlement of plaintiffs' claim against LAQ and ordered notice of the proposed settlement to be mailed to all members of the class on or about December 29, 1989. Any class member objecting to the proposed settlement was given until January 28, 1990 to file their objection and, if desired, notice of their intention to appear at the hearing on final approval of the settlement. A hearing was held on February

12, 1990 and the court makes the following determination pursuant to Fed. R. Civ. P 23(e).

Rule 23(e) requires the court to review the proposed settlement to make sure that the rights of the absent class members are not jeopardized by the settlement.[1] The court, by approving the settlement, finds the settlement to be fair, reasonable and adequate to all members of the class. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3rd Cir. 1974). This does not mean that the court should substitute its judgment for that of the members of the class. 7b C. Wright, A. Miller & M. Kane *Federal Practice and Procedure*, § 1797 (1986). Any doubts about settling should also be tempered by the general policy favoring settlement. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1985).

Factors that should be considered in approving or disapproving class settlements include:

1. The complexity, expense and likely duration of the litigation.
2. The reaction of the class to the settlement.
3. The stage of the proceedings and the amount of discovery completed.
4. The risks of establishing liability.
5. The risks of establishing damages.
6. The risks of maintaining the class action through the trial.
7. The ability of the defendants to withstand a greater judgment.
8. The range of reasonableness of the settlement fund in light of the best possible recovery.

---

[1] Rule 23(e) states:

> Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

9. The range of reasonableness of the settlement fund to a possible recovery in light of all the possible attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975), *quoting, City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974).

Complexity

The complexity of this action is unquestioned. The plaintiff class is comprised of in excess of 35,000 public and not for profit private schools and school districts. The 52 original defendants represent most of the miners, millers, suppliers and manufacturers of friable asbestos building products. The case was originally filed in 1983, almost seven years ago. Class certification appeals were taken to the Supreme Court. The Third Circuit has stated that the facts giving rise to this case represent "an unprecedented situation. . . ." *In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3rd Cir.), *cert denied*, 479 U.S. 915 (1986).

Class Reaction

Three members of the class filed objections to the settlement, one of which was withdrawn prior to the February 12, 1990 hearing.

Redmond School District of Redmond, Oregon objected that the settlement amount was too small when apportioned pro rata among the various members of the class. In light of LAQ's position in the asbestos industry and peripheral involvement in this case, discussed *infra*, this settlement amount appears to be adequate.

The Akron City School District Board of Education (Akron) also filed an objection to the proposed settlement. Akron's objection is founded upon its uncertainty concerning its status as a member of the class. On March 27, 1989, Pretrial Order No. 183 was entered enjoining several

class members from litigating individual claims against National Gypsum. Although National Gypsum sought an injunction against Akron, Akron was not enjoined. Upon reconsideration of Pretrial Order No. 183, Pretrial Order No. 205 was issued and Akron was enjoined from pursuing its individual claim. While Akron acted quickly in filing its objection in order to preserve its right to inspect the settlement agreement, the right to supplement its objection was specifically reserved. *Akron Memorandum in Opposition to Proposed Settlement*, at 3. Since filing their objection, Akron has discovered no reason to question the fairness, reasonableness or adequacy of the LAQ settlement. Whether or not Akron's motion for Reconsideration of Order 205 is granted, Akron stands to lose nothing as a result of the LAQ settlement since Akron has agreed to dismiss LAQ as a defendant in its individual action. *Akron City School District Board of Education v. Armstrong World Industries*, No. CV 85 4 1242, Order (Ohio C.P. May 19, 1989).

The Stage of the Proceedings

Plaintiffs and LAQ have completed considerable discovery in order for plaintiffs to evaluate the relative strengths and weaknesses of their case against LAQ.

Risk of Establishing Liability

Plaintiffs recognize that they face a significant risk in attempting to establish liability against LAQ. LAQ, as a miner of asbestos, will assert unique defenses. For example, LAQ has indicated that it would assert that it sold a raw material to sophisticated buyers that materially altered the product, thereby making them not liable. Further, discovery has shown that LAQ started mining asbestos after 67% of the plaintiffs' schools had been built, that 70% to 75% of LAQ's product was sold overseas and that LAQ mined a fiber unsuitable for the friable asbestos-containing products at issue in this action.

Risk of Establishing Damages

Along with their peripheral position in this litigation, LAQ has compiled an impressive record in asbestos property damage actions. Of the approximately 90 actions filed against LAQ, it remains as a defendant in only about 20. In none of these actions has LAQ been held liable. In fact, LAQ has previously settled only one asbestos property damage claim. Against this background, plaintiffs would be justified in determining that the task of establishing damages against LAQ is herculean.

Maintaining the Class Action

The risks of maintaining the class action through the trial cannot be discounted. Defendants have vigorously fought the certification of the class and have asserted numerous procedural and substantive defenses. In an action this complex, plaintiffs can never be assured of an eventual victory at trial.

Withstanding a Greater Judgment

While it is not disputed that LAQ could financially withstand a greater judgment, given LAQ's peripheral position in this action, withstanding a greater judgment is not an issue in approving this settlement.

Reasonableness of the Settlement Fund

In light of all of the risks of continuing against LAQ, the recovery in this settlement appears to the court to be very reasonable.

Defendants' Objections

Generally, non-settling defendants have no standing to object to a proposed settlement since they would have no standing to appeal. Pretrial Order No. 66 provides the only

exceptions are when the rights of non-settling defendants are prejudiced by the settlement or non-settling defendants are precluded from seeking indemnification from settling defendants. *See, In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979). The non-settling defendants have failed to show that either of these exceptions are applicable here.

Accordingly, I find the proposed settlement agreement to be fair, reasonable and adequate for the members of the class. Plaintiffs' motion to strike the objections of the non-settling defendants is dismissed as moot.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 90-1247 & 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and
NORTHEASTERN SCHOOL DISTRICT

Appellees,

vs.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES INC., DANA CORPORATION, U.S. GYPSUM, U.S. MINERAL PRODUCTS COMPANY, SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION COMPANY, W.R. GRACE & CO., OWENS-CORNING FIBER-GLAS CORPORATION, STANDARD INSULATION, INC., NORTH AMERICAN ASBESTOS CORPORATION, CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LIMITED, THE FLINTKOTE CO., FIBREBOARD CORPORATION, GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORPORATION, BES-TEX, INC., GEORGIA-PACIFIC CORP.

Kaiser Cement Corporation,
Appellant No. 90-1247

United States Gypsum Company,
Appellant No. 90-1248

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 83-0268)

PRESENT: SCIRICA, COWEN and ALDISERT,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 19, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 21, 1990, be and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/

Clerk

Costs taxed in favor of Barnwell Sch Dist. as follows:

Briefs $156.00

December 13, 1990

Certified as a true copy and issued in lieu of a formal mandate on January 23, 1991

Test: /s/

Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: SCHOOL ASBESTOS LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

FILED

FEB 20 1990

MICHAEL E. KUNZ, Clerk

JUDGMENT PURSUANT TO F.R.CIV.P. 54(b)
AND PRETRIAL ORDER NO. 212 FINALLY APPROVING
1989 AGREEMENT OF SETTLEMENT WITH
DEFENDANT LAC D'AMIANTE DU QUEBEC, LTEE

WHEREAS, certain class actions consolidated as *In re Asbestos School Litigation*, Master File No. 83-0268 (E.D. Pa.) (hereinafter, the "Class Actions"), have been filed in this Court on behalf of an asserted class (hereinafter, the "Class") alleged therein against, *inter alia*, Lac d'Amiante Du Quebec, Ltee (hereinafter "LAQ").

WHEREAS, on March 31, 1989, class plaintiffs and defendant LAQ (hereinafter, "Settling Defendant") entered into a settlement agreement, entitled "Settlement Agreement With Defendant Laq d'Amiante Du Quebec, Ltee" (hereinafter, the "Partial Settlement");

WHEREAS, on November 22, 1989, Pretrial Order No. 198 was entered by this Court preliminarily approving the Partial Settlement and directing that notice be given to the class of the proposed Partial Settlement, and of a

hearing to determine whether the proposed Partial Settlement should be approved as fair, adequate and reasonable and to hear any objections thereto;

WHEREAS, such a hearing was held, as noticed, on February 12, 1990, and, prior to the hearing, proof of notice of the proposed Partial Settlement was presented and filed, on February 9, 1990;

WHEREAS, notice of the Partial Settlement was sent to all members of the Class certified in Pretrial Order No. 20, excluding all schools which filed a request to be excluded from the class pursuant to Fed.R.Civ.P. 23(c)(2), which notice advised class members of their right to appear at the hearing in support of or in opposition to the proposed Partial Settlement;

WHEREAS, the Court has heard counsel on behalf of the parties, and has reviewed all of the submissions presented with respect to the proposed Partial Settlement.

NOW, THEREFORE, on this 16th day of February, 1990, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The members of the Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 20, excluding all schools which filed a timely and valid request to be excluded from the Class pursuant to Fed.R.Civ.P 23(c)(2).

2. The Partial Settlement is in all respects fair, adequate, reasonable and proper, and in the best interests of the Class, and is approved.

3. Notice of the proposed Settlement, as required by Rule 23(e) of the Federal Rules of Civil Procedure, has been given in an adequate and sufficient manner, complying in all respects with such Rules and due process, including, but not limited to, the forms of notice and the methods of identifying and giving notice to the Class.

4. Except as provided herein, these Class Actions are dismissed with prejudice and on the merits and without costs only to Settling Defendant. This dismissal shall apply to these class actions and all claims, demands, rights or causes of action (including all claims for punitive damages, costs, expenses or fees), present or future, known and unknown relating to asbestos and asbestos-containing materials, which the class, individually or collectively, and their predecessors or successors, of any of their past or present representatives, assigns, subsidiaries, divisions, affiliates, parents, partners, officers, directors, employees or agents, had, now has or hereinafter can, shall or may have against LAQ or any other person in connection with, arising out of, based in while or in part on, or in any way related to facts, matters, acts of commission or omission, statements, agreements or occurrences which were asserted or could have been asserted in any of the complaints and amended complaints in these class actions (hereinafter, the "Claims").

5. Plaintiffs and each and every member of the Class are hereby deemed to have constructively released all Claims against LAQ as if they had individually executed a Release and Covenant Not to Sue in the form of Exhibit A attached to the Partial Settlement agreement and incorporated herein.

6. Jurisdiction is hereby retained as to all matters related to the administration and consummation of the Partial Settlement hereby approved.

7. This Order and the Partial Settlement are not intended and are not be construed as a release or dismissal by plaintiffs and Class Members of any claims or rights which any of them have or may have against any non-settling defendant or defendants.

8. The Court finds that there is no just reason for delay in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Clerk of the

District Court is directed to enter this Judgment. Certification under Rule 54(b) will not result in unnecessary appeallate review nor will review of the adjudicated claims moot any further developments in this case. Even if subsequent appeals are filed, the nature of these claims are such that the appellate court would have have to decide the same issue more than once.

It is further ORDERED that plaintiff's motion to strike the objections of certain defendants is DISMISSED AS MOOT.

BY THE COURT:

/s/

JAMES McGIRR KELLY, J.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 90-1125

IN RE: SCHOOL ASBESTOS LITIGATION
KAISER GYPSUM, INC.,
Petitioner,

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45
Respondent.

No. 90-1126

IN RE: SCHOOL ASBESTOS LITIGATION
UNITED STATES GYPSUM COMPANY,
Petitioner,

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL
DISTRICT, BOARD OF EDUCATION OF THE
MEMPHIS CITY SCHOOLS, and a
Conditionally Certified Class,
Respondents.

No. 90-1185

IN RE: ASBESTOS SCHOOL LITIGATION
FIBREBOARD CORPORATION,
Petitioner,

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL
DISTRICT, BOARD OF EDUCATION OF THE
MEMPHIS CITY SCHOOLS, and a
Conditionally Certified Class,
Respondents.

No. 90-1199

IN RE: ASBESTOS SCHOOL LITIGATION
W. R. GRACE & CO.,
Petitioner,

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL

DISTRICT, BOARD OF EDUCATION OF THE
MEMPHIS CITY SCHOOLS, and a
Conditionally Certified Class,

Respondents.

Consolidated Petitions for a Writ of Mandamus or Prohibition to the Honorable James McGirr Kelly. United States District Court for the Eastern District of Pennsylvania (D.C. Civil Master File No. 83-0268)

Nos. 90-1125, 90-1126 & 90-1185
Argued: September 19, 1990
No. 90-1990 Submitted under
Third Circuit Rule 12(6):
September 19, 1990

Before: SCIRICA, COWEN and ALDISERT,
Circuit Judges.

(Filed December 13, 1990)

Daniel J. Ryan, Jr., Esq.
MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
1515 Locust Street
Philadelphia, PA 19102

Patrick J. Hagan, Esq.
KINCAID, GIANUNZIO, CAUDLE &
HUBERT
200 Webster Street, Suite 200
Oakland, CA 94604-0828

ATTORNEYS FOR PETITIONER,
Kaiser Gypsum Co. Inc.

Joseph B. G. Fay, Esq.
(Argued)
J. Gordon Cooney, Jr., Esq.
John H. Lewis, Jr., Esq.
Andrew D. Leipold, Esq.
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

ATTORNEYS FOR PETITIONER
U.S. Gypsum Co.

Walter R. Milbourne, Esq.
Timothy W. Callahan, II, Esq.
Frank M. D'Amore, Esq.
SAUL, EWING, REMICK & SAUL
3800 Centre Square West
Philadelphia, PA 19102

ATTORNEYS FOR PETITIONER,
Fibreboard Corporation

Denis McInerney, Esq.
Allen S. Loslyn, Esq.
CAHILL, GORDON & REIDEL,
80 Pine Street
New York, NY 10005

ATTORNEYS FOR PETITIONER,
W. R. Grace & Co.

David Berger, Esq. (Argued)
Harold Berger, Esq.
Warren D. Mulloy, Esq.
Thomas F. Hughes, Esq.
BERGER & MONTAGUE
1622 Locust Street
Philadelphia, PA 19103

Daniel A. Speights, Esq.
SPEIGHTS & RUNYAN
304 Lee Avenue
P.O. Box 685
Hampton, SC 29924

Herbert B. Newberg, Esq.
Harvey Kronfeld, Esq.
Gerald E. Wallerstein, Esq.
Sandra L. Duggan, Esq.
227 South Sixth Street
Lippincott Bldg., 2nd Floor
Philadelphia, PA 19106

ATTORNEYS FOR RESPONDENTS,
Barnwell School District NO. 45 School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools, and a Conditionally Certified Class

Charles Alan Wright, Esq.
727 E. 26th Street
Austin, TX 78705

OF COUNSEL TO RESPONDENTS

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

These proceedings arise out of an on-going federal diversity class action, *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986), and require us to decide whether to grant the petitioners' requests for a writ of mandamus or prohibition directing the district court to dismiss the class action complaints for lack of subject matter jurisdiction. Because we conclude that the petitioners have not met their burden of showing a "clear and indis-

putable" lack of subject matter jurisdiction over the class, we will deny the consolidated petitions for a writ of mandamus in Nos. 90-1125 and 90-1185, and the petition for a writ of prohibition in No. 90-1126. We also consolidate with these petitions W. R. Grace & Co.'s petition for a writ of prohibition in No. 90-1199, and will deny it as well.

I.

On January 17, 1983, the class action giving rise to these petitions was filed in the district court on behalf of a national class consisting of all public and private elementary and secondary schools throughout the country. The complaints alleged claims against approximately fifty manufacturers and producers of asbestos-containing materials, which purportedly were used in the construction of some of the class plaintiffs' school buildings. On September 28, 1984, the district court certified the class action pursuant to F.R.Civ.P. 23(b)(3), and we affirmed the class certification on May 1, 1986. *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). In 1989, several defendant manufacturers requested the dismissal of the federal class action of certain unnamed members on the basis that (1) not every class member has a claim in excess of the $10,000 jurisdictional amount; (2) complete diversity of citizenship between all absent class members and all defendants is required in a diversity-based class action; and (3) asbestos property damage claims are "local actions" involving real estate and may only be brought in the state where the real estate is located. After briefing and oral argument, the district court issued Pretrial Order No. 191 on May 1, 1989, directing the class plaintiffs to amend their complaints to conform with 28 U.S.C. § 1332(a). The plaintiffs accordingly amended their complaints to allege an amount in controversy of $10,000 for each plaintiff class member except a hypothetical small number of school districts, not yet identifiable, that only

have asbestos inspection costs under $10,000. The complaints also averred that the citizenship of each named class representative was diverse from that of each defendant manufacturer.

On November 15, 1989, after several defendants had filed challenges to the amended complaints, the district court issued Pretrial Order No. 197 in which it declined to dismiss the class action for lack of subject matter jurisdiction. In its memorandum and order, the district court observed that *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), requires dismissal of only those class members who fail to meet jurisdictional amount requirements. Because those plaintiffs could not be readily determined, the district court concluded that "[a]ny potential jurisdictional problems raised in this case can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000." App. at 2-3. The district court also determined that complete diversity between all class members and all defendants is not required, and that the "local action" doctrine is inapplicable to the asbestos property damages claims in this class action. App. at 4-6.

After the district court refused to certify Order No. 197 for interlocutory review under 28. U.S.C. § 1292(b), two defendant manufacturers, Kaiser Gypsum Company, Inc. (No. 90-1125) and Fibreboard Corporation (No. 90-1185), filed petitions for a writ of mandamus directing the district court to dismiss the pending complaints and to refrain from any adjudication on the merits until the plaintiffs have cured all jurisdictional defects. A third defendant, United States Gypsum Company, filed a petition for writ of prohibition (No. 90-1126), in which W. R. Grace & Co. joined (No. 90-1199), seeking similar relief. These are the four petitions consolidated before us.

II.

Federal courts have the power to issue writs of mandamus or prohibition under the All Writs Act, 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." That two petitioners in this case have requested a writ of mandamus and two have requested a writ of prohibition is unimportant; it does not affect the relief requested. Although a writ of mandamus may appear more appropriate when the request is for an order mandating action, and a writ of prohibition may be more accurate when the request is to prohibit action, modern courts have shown little concern for the technical and historic differences between the two writs. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3932 (1977 & Supp. 1990); *see Ex parte Simons*, 247 U.S. 231, 239-40 (1918); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 n.1 (10th Cir. 1982). Under the All Writs Act, the form is less important "than the substantive question [of] whether an extraordinary remedy is available." *In re Davis*, 730 F.2d 176, 181 & n.10 (5th Cir. 1984).

The Supreme Court admonishes federal appellate courts to exercise their writ power with caution. *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976); *see DeMast v. Weiss*, 669 F.2d 114, 116- 17 (1982). Because the remedy is so extreme, courts should invoke it only "in extraordinary situations." *Kerr*, 426 U.S. at 402. Traditionally, federal courts have used the power "only to confine inferior courts to their lawful jurisdiction or to compel them to exercise authority when they have a duty to do so." *DeMast*, 669 F.2d at 117 (citing *Will v. United States*, 389 U.S. 90, 95 (1967)). In defining "jurisdiction," the Supreme Court has avoided a "narrow and technical" construction,

directing that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will*, 389 U.S. at 95 (quoting *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)).

Two important policy considerations support the concept that writs of mandamus or prohibition should be granted only sparingly. First, mandamus actions " 'have the unfortunate consequence of making the [district court] judge a litigant . . . ' in the underlying case." *Kerr*, 426 U.S. at 402 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384-85 (1953)). Second, frequent use of writs of mandamus would ignore the important judicial goal of avoiding piecemeal appellate review. *Kerr*, 426 U.S. at 403; *DeMast*, 669 F.2d at 117.

To ensure the use of writs in only "extraordinary situations," the Supreme Court has established two prerequisites to the issuance of a writ: (1) that the petitioner have no other "adequate means to attain the [desired] relief," and (2) that the petitioner meet its burden of showing that its right to the writ is "clear and indisputable." *Kerr*, 426 U.S. at 403; *see DeMast*, 669 F.2d at 117. Once these two prerequisites are met, the court's decision of whether to issue the writ is largely one of discretion. *Kerr*, 426 U.S. at 403.

III.

Although recognizing constraints on the federal courts' writ power, the petitioners argue that mandamus or prohibition generally is appropriate to prevent the district court from acting outside its jurisdictional authority. We agree. Courts traditionally have employed writs to restrain jurisdictional excesses, particularly when a lower court has acted without authority to do so. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). However, mere doubt regarding the trial court's subject matter jurisdiction is in-

sufficient to invoke a court's writ power. Justice Brandeis, speaking for the Court, has stated:

> If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. If, however, the jurisdiction of the lower court is doubtful . . . or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record . . . or if the complaining party has an adequate remedy by appeal or otherwise . . . the writ will ordinarily be denied.

Ex parte Chicago, R. I. & Pac. Ry., 255 U.S. 273, 275-76 (1921) (citations omitted); *see In re Thornburgh*, 869 F.2d 1503, 1517-18 (D.C. Cir. 1989) ("We do not find the 'clear and indisputable' lack of jurisdiction in the district court . . . that is necessary to warrant a writ of mandamus."). Thus, only if the petitioners show that the district court's lack of subject matter jurisdiction is "clear and indisputable" and that no other adequate means exists to attain relief should we grant the extraordinary relief requested in these petitions.

The petitioners suggest three jurisdictional defects supporting their request for a writ of mandamus or prohibition: (1) not every class member has a claim in excess of the then-applicable $10,000 jurisdictional amount; (2) complete diversity of citizenship between all absent class members and all defendants is required in a diversity-based class action; and (3) asbestos property damage claims are "local actions" involving real estate and may only be brought in the state where the real estate is located. For the reasons stated below, none of these arguments demonstrates the district court's "clear and indisputable" lack of subject matter jurisdiction over the class.

The petitioners also argue that pendent party jurisdiction is not available to the class plaintiffs in lieu of federal

diversity subject matter jurisdiction. Because we decide that the petitioners have failed to meet their burden of showing that diversity jurisdiction does not exist, we need not reach their claim of lack of pendent party jurisdiction.

IV.

The petitioners first contend that the class plaintiffs (the respondents) have not met their burden of pleading the $10,000 jurisdictional amount in controversy required under former 28 U.S.C. § 1332(a) (Congress since has amended the statute to require an amount in controversy of $50,000). In their amended complaints, the class plaintiffs conceded that a hypothetical small portion of the class will not be able to meet the amount in controversy. However, the petitioners claim that as many as sixty percent of the school districts will not be able to meet the jurisdictional amount because, according to an EPA report, they do not have friable asbestos-containing materials in one or more of their buildings.

It is well established that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case. . . ." *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973). However, as noted in the district court's memorandum and order, *Zahn* does not require that an entire class action be dismissed for lack of subject matter jurisdiction over some of the class members. Rather, the court is required only to dismiss those class members whose claims appear to a "legal certainty" to be less than the jurisdictional amount. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

Because it was not apparent which class plaintiffs should be dismissed, the district court chose to delay dismissing any plaintiffs until it is shown *at trial* that their claims do not meet the jurisdictional amount. Relying on F.R.Civ.P. 12(d), the district court noted that "[a]ny po-

tential jurisdictional problems raised in this case [could] be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000." App. at 2-3.

Under F.R.Civ.P. 12(d), a judge who is deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may postpone the decision until trial. The rule specifically provides that a Rule 12(b) motion, "whether made in a pleading or by motion, . . . shall be heard and determined before trial on application of any party, *unless the court orders that the hearing and determination thereof be deferred until the trial.*" F.R.Civ.P. 12(d) (emphasis added).

At this juncture, we are constrained to note how the dissent construes the action of the district court here. It interprets the district court's language, "potential jurisdictional problems . . . be cured *at* trial," to mean *after* trial (emphasis added). Thus, it states that the district court's order purported to " 'cure' the jurisdictional deficiency *after* trial." Dissenting opinion typescript at 4 (emphasis added); to "postpon[e] the resolution of a jurisdictional failure until *after* trial," *id.* (emphasis in original); to defer "resolution of the jurisdictional question until after a trial," *id.* at 9 n.4; to sanction dismissal only "where a plaintiff has failed to establish damages for less than the jurisdictional minimum after trial," *id.* at 12; and to postpone "resolution of jurisdictional questions until after trial," *id.* at 13.

We believe that the dissent's interpretation is both unfair and inaccurate. The district court's language "*cured at trial*" is free from ambiguity and is consistent with the clear authority of Rule 12(d) permitting the jurisdictional decision to be "deferred until the trial."

The Court of Appeals for the Sixth Circuit, in *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988),

has considered the effect of Rule 12(d). In *Sterling*, the defendant had filed two separate Rule 12(b)(1) motions seeking pretrial dismissal of the class action because certain representative class plaintiffs did not allege the appropriate amount in controversy. Rather than immediately dismissing any plaintiffs' claims, the district court deferred the jurisdictional decision until trial. The trial judge observed:

> [I]t also seems to me that it is not necessary *at this point* for the court to wholesale order a dismissal of all those potential class members who may not at this point have pleaded, because it seems to me that's a matter that might well come up at some point down the road after the initial phase of the case is tried. . . . *[W]hen you get down to establishing amounts in a case such as this, where there is a jury trial, it puts a burden on the court that the court really doesn't want to undertake*, and that is an assessment of claims at this point to try and make a determination of whether a jurisdictional amount, in fact, can be asserted at this point. . . .

Id. at 1195 n.5 (emphasis added). The appellate court determined that the trial judge's action was not improper. Moreover, the court observed that the "method and timetable" for deciding a Rule 12(b) motion is "left to the *sole* discretion of the trial judge." *Sterling*, 855 F.2d at 1195 (emphasis added).

As noted by the district court, however, only one of the motions to dismiss in this case was a Rule 12(b)(1) motion; the other was premised on Rule 12(h)(3). Thus, even if we apply Rule 12(d) to the 12(b)(1) motion, we still must consider the language in Rule 12(h)(3).

Rule 12(h)(3) provides that subject matter jurisdiction can never be waived: "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

However, we find that Rule 12(h)(3) does not require dismissal at this juncture because (1) it is not clear that the district court lacks jurisdiction over the subject matter, and (2) a court does not have to dismiss a claim if the jurisdictional failure can be cured. *See Freistak v. Egger*, 551 F. Supp. 238, 241 (M.D. Pa. 1982); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 169 F. Supp. 774 (D.C. Cal. 1958), *rev'd on other grounds*, 362 U.S. 73 (1960); *see also* 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1393, at 772-73 (1990).

To accept the argument advanced by the petitioners, we would have to conclude that Rule 12(h)(3) nullifies the unequivocal language of Rule 12(d): "The defense[ ] specifically enumerated (1) . . . in subdivision (b) of this rule [lack of jurisdiction over the subject matter] . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." We do not believe that nullification of Rule 12(d) was Congress's intent in approving the Rule 12(h)(3) submission of the Advisory Committee on Civil Rules. We do not believe also that Rule 12(h)(3) requires the district court to rule immediately upon the presentation of a motion to dismiss; we believe that in *ipsissimis verbis* Rule 12(d) authorizes the district court to defer the hearing and determination.

Because we think that the two provisions must be integrated to provide consistency and be accorded full meaning, we hold that Rule 12(h)(3) invests the district court with the *power* to dismiss the action, and that Rule 12(d) discloses *when* this power may be exercised. Any other interpretation would mean that Rule 12(h)(3) strips away completely the discretionary authority conferred in Rule 12(d) when a lack of subject matter jurisdiction is raised.

Applying Rules 12(d) and 12(h)(3) and the rationale in *Sterling*, we conclude that the district court had the discretionary authority to delay until trial the dismissal of

those class members that cannot meet the amount in controversy. Postponing dismissal of such plaintiffs not only appears prudent, but it meshes with our policy. In *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971), we stated that "[I]t is our intention to require removal from the trial list of those 'flagrant' cases where it can be determined in advance 'with legal certainty' that the congressional mandate of $10,000 minimum was not satisfied." *Id.* at 292. This federal class action is not one of those "flagrant" cases. Conceding that some of the class plaintiffs will not meet the jurisdictional amount, the district court is willing to dismiss such plaintiffs once they are identified at trial. We find no abuse of discretion in this approach.

V.

The petitioners next argue that the class must be dismissed due to lack of complete diversity of citizenship. They mount the novel contention that under 28 U.S.C. § 1332(a)(1) the citizenship of each class plaintiff must be diverse from the citizenship of each defendant manufacturer. We reject this argument.

From settled class action cases emerges the precept that in a federal class action only the citizenship of the named class representatives must be diverse from that of the defendants. *Snyder v. Harris*, 394 U.S. 332, 340, *reh'g denied*, 394 U.S. 1025 (1969); *see In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 162 (2d Cir. 1987); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.95, at 23-546 (2d ed. 1987); C. Wright, *Law of Federal Courts* § 31, at 170 (4th ed. 1983); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3606, at 424 (1984 & Supp. 1990). What petitioner Kaiser Gypsum Co., Inc. describes in its brief as "dictum in *Snyder v. Harris*," Petitioner's Brief at 23, the Court of Appeals for the Second Circuit describes as "hornbook law, based on 66 years of Supreme Court precedent":

Although we understand the need to preserve issues for further review, we confess a certain surprise at the vigor with which this argument was pressed in this court and the amount of time that was devoted to it at oral argument. It is hornbook law, based on 66 years of Supreme Court precedent, that complete diversity is required only between the named plaintiffs and the named defendants in a federal class action. 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3606, at 424 (2d ed. 1966) ("[t]he courts look only to the citizenship of the representative parties in a class action"). As the Supreme Court noted in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L.Ed. 2d 319 (1969):

> Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 [41 S. Ct. 338, 65 L.Ed. 673] (1921).

394 U.S. at 340, 89 S. Ct. at 1059. . . . Thus, if appellants' theory of class action jurisdiction is to become law, this must be done by the Supreme Court.

Agent Orange, 818 F.2d at 162. The trial courts in this circuit have not questioned this precept. *Pirrone v. North Hotel Assocs.*, 108 F.R.D. 78, 83 n.2 (E.D. Pa. 1985); *McMahon Books, Inc. v. Willow Groves Assocs.*, 108 F.R.D. 32 40 n.5 (E.D. Pa. 1985). Because the complaints in the case before us properly allege that the citizenship of the named class representatives is diverse from that of the defendants, the requisite diversity of citizenship is present.

The petitioners unconvincingly argue that *Finley v. United States*, 109 S. Ct. 2003 (1989), overruled *Snyder* sub silentio. They claim that *Finley* requires complete diversity of citizenship between all class plaintiffs and all defendants in Rule 23(b)(3) class actions. This argument is unimpressive for several reasons.

First, *Finley* does not even address the *Snyder* rule. The only issue before the court in *Finley* was whether the Federal Tort Claims Act "permits an assertion of pendent jurisdiction over additional parties." *Id.* at 2005. Relying on precedent rejecting pendent party jurisdiction, *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court held that a "grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different *parties*." *Finley*, 109 S. Ct. at 2010 (emphasis added).

At no point did the Supreme Court even allude to the diversity requirement in federal class actions. Surely, if *Finley*'s objective was to overrule *Snyder* by implication and to require complete diversity between all plaintiffs and all defendants in class actions, the Court at least would have made direct or indirect reference to the subject. The Court knows how to state explicitly that a previous decision is no longer to be followed; it knows how to frame a precept in the form of a major premise in which the rules of logic support an implication that a previous holding is threatened; it also knows how to send signals that it will be reconsidering a previous ruling. No such reference to diversity class actions—by express direction, implication or signal-sending—is present in *Finley*. To suggest that a subliminal message can be found therein, as urged by the petitioners here, is to concoct a fictitious extravaganza that has no place in a serious argument before this court. The petitioners have not submitted a single case supporting their position that *Finley* has obliterated the

teachings of *Snyder v. Harris*; nor has our independent research discovered any such decision.

Moreover, counsel for United States Gypsum Co. and Kaiser Cement Corp. candidly explained at oral argument the motive behind their argument that *Finley* now requires complete diversity of all members of the class. Counsel stated that the purpose was to destroy nationwide federal diversity class actions:

> THE COURT: [I]f we will accept your subject matter jurisdiction arguments and those of your colleague or your friend who just argued——
>
> MR. KIRBY: Both.
>
> THE COURT:—that what this is actually doing is really virtually precluding class actions in diversity matters?
>
> MR. KIRBY: Nationwide class actions would, we sincerely hope, be dead.

Transcript of Oral Argument at 78-79, *In re Asbestos School Litig.*, ___ F.2d ___ (3d Cir. 1990) (Nos. 90-1247 & 90-1248). Here we must proceed with caution. It is for the Congress, not the courts, to legislate changes in the diversity laws.

In 1988 Congress reconsidered the diversity jurisdiction of the federal courts. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (partly codified as amended at 28 U.S.C. § 1332). Although the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice strongly recommended that "virtually all of the Federal court jurisdiction based on the citizenship of the parties" be eliminated, the full Committee on the Judiciary rejected this proposal, suggesting instead that the jurisdictional amount in controversy be raised from $10,000 to $50,000. H.R. Rep. No. 100-889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 5987-88. One of the principal rea-

sons the Committee rejected the complete abolition of diversity jurisdiction was the opposition of key officials responsible for state court systems. Siegel, *Commentary on 1988 Revision*, in 28 U.S.C. § 1332 (West Supp. 1990). Congress accepted the Committee's compromise and voted merely to raise the amount in controversy. *Id.* Notwithstanding the discussions regarding abolition, Congress did not make any attempt in its 1988 revision to exempt federal class actions from diversity jurisdiction.

The legislative history of 28 U.S.C. § 1332 and the Congressional endorsement of Rule 23(b)(3) class actions manifest Congress's support of diversity-based class actions. If the petitioners wish to sound the death knell on such class actions, their sounding board is the Congress and not this court.

VI.

Petitioner Kaiser Gypsum Company also contends that because the "local action" doctrine applies to any action directly affecting land and real property, the district court's subject matter jurisdiction is limited by the doctrine to claims related to property located in Pennsylvania. The district court rejected this argument, determining that the plaintiffs' claims are "largely tort claims," which are "transitory" rather than "local" in nature.

The law distinguishes between transitory and local actions. Local actions are essentially *in rem* and may only be prosecuted "where the thing on which they are founded is situated." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3822, at 204-05 (1986) (quoting *Casey v. Adams*, 102 U.S. 66, 67-68 (1880)). A transitory action may be brought wherever venue is proper. *Id.*

The class plaintiffs cite *Dayton Indep. School Dist. v. U.S. Mineral Prods. Co.*, No. B-87-00507-CA (E.D. Tex. Feb. 14, 1989), as authority for their contention that this

class action is transitory. In an action involving the same allegations and legal theories as this case, the *Dayton* court held:

> Such claims sound primarily in *product liability and in tort.* The gravamen of Plaintiff's complaint is that the presence of Defendants' products in their buildings poses a health risk to building workers and occupants which must be addressed.
>
> In several years of managing large multi-plaintiff asbestos litigation such as the cases presently before the Court, there has been no occasion to consider title to or possession of any of the buildings which contain the asbestos products at issue, or to resolve any issues involving principles of property law. The parties may use whatever terms they please to describe these cases, but the fact remains that, regardless of the nomenclature used, *these claims are transitory in nature rather than local in nature.* Suits such as these asbestos cases do not involve title to or possession of land such as would be governed by the local action doctrine. Rather, the Plaintiffs are seeking to recover monetary damages arising out of the alleged manufacture and sale of defective products, which "might have taken place anywhere." *The local action rule is not applicable to Plaintiff's claim.*

Id. (emphasis added). The district court in this case conceded in its order that questions relating to the ownership of some of the school buildings may arise later in the litigation. App. at 6. As an alternative to dismissing the complaints now, the district court determined that it could dismiss those school districts for lack of subject matter jurisdiction once the local action doctrine is shown to apply.

We agree that it is premature to invoke the local action doctrine at this time. Because the alleged claims appear transitory and are not bound to any issues of title or

possession of real property, we reject Kaiser Gypsum's local action argument.

VII.

We conclude that petitioners have not met their burden of showing a "clear and indisputable" lack of federal diversity subject matter jurisdiction in this case. Because they have failed to establish this prerequisite to the issuance of a writ, the consolidated petitions for a writ of mandamus or prohibition will be denied.

COWEN, *Circuit Judge*, dissenting.

At issue in these consolidated Fed. R. Civ. P. 23(b)(3) asbestos class action appeals are two fundamental questions of federal jurisdiction. The first is whether a district court has the power to hear a class action suit under its diversity jurisdiction, 28 U.S.C.A. § 1332(a) (1966 & Supp. 1990), when there is substantial and uncontradicted evidence that a majority of the plaintiff class has less than the jurisdictional minimum amount in controversy in direct violation of the rule in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). The district court held that it had the power to hear the cases without dismissing the class members who lacked jurisdictionally sufficient claims as long as it only entered final orders with respect to those claims which after litigation prove to be in excess of the jurisdictional minimum.

The second issue is whether in a class action diversity suit there must be complete diversity between all members of the plaintiff class and all defendants, or whether it suffices for there to be diversity between only named plaintiffs who represent the plaintiff class and all defendants. The district court purported to follow a "well settled rule" which allows a class action to proceed even where complete diversity is lacking, provided that there

is complete diversity between named plaintiffs and all defendants.

The majority today holds that the district court was acting within the bounds of its jurisdiction in proceeding to the merits despite the jurisdictional defects. In so holding, the majority breaks new ground in the field of federal jurisdiction. Because I believe that the district court lacks jurisdiction over these consolidated class actions and that the majority's decision today is unsupported by precedent and lacks a theoretical foundation, I must dissent.

I.

All parties to this action agree that every plaintiff in a Rule 23(b)(3) class action must independently satisfy the amount in controversy requirement of section 1332(a) with a claim in excess of the jurisdictional minimum. *Zahn*, 414 U.S. at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.' ") (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)). Since only the main plaintiffs met the jurisdictional minimum in *Zahn*, the United States Supreme Court would not allow the suit to proceed as a class action. *See also Snyder v. Harris*, 394 U.S. 332 (1969) (separate claims in a class action suit could not be aggregated for the purpose of meeting the jurisdictional minimum amount in controversy requirement). *Zahn* requires that each distinct claim satisfy the jurisdictional minimum requirement because the Court interprets "matter in controversy" language in 28 U.S.C.A. § 1332(a) as relating to each claim in a class action suit, and not the total amount that might be claimed on the facts giving rise to the class action litigation. *Zahn*, 414 U.S. at 298-300.

All parties to this action agree that some of the represented plaintiffs in this class action do not have claims

meeting the jurisdictional minimum amount in controversy contained in former 28 U.S.C.A.§ 1332(a).[1] Indeed, plaintiffs have admitted in their amended complaints that some plaintiffs cannot in good faith allege claims in excess of $10,000.[2] Furthermore, defendants have introduced uncontradicted evidence that when this case was filed as much as 60% of the plaintiff class did not have claims

---

[1] At the time plaintiffs filed these suits, the statutory authority which empowered federal courts to exercise diversity jurisdiction read:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C.A. § 1332(a) (1966).

[2] On May 30, 1989, after the district court entered Pretrial Order No. 191, which directed plaintiffs to file amended complaints conforming to the requirements of 28 U.S.C.A. § 1332(a), the named plaintiffs amended their complaint to allege:

> The plaintiff and all members of the class [*except a minimal portion thereof*], have claims in excess of $10,000 for costs incurred *inter alia* in the inspection of the school buildings, and all other costs incidental thereto, and costs of repairs and replacement plus punitive damages. *Entities (not now identified) may exist which* own or operate very small school systems in which no friable or potentially friable asbestos-containing material exists and for whom punitive damages may not be recoverable who *cannot allege $10,000 in controversy*. [emphasis added].

Defendants have shown that 60% of the plaintiff class cannot meet the jurisdictional minimum. Nor can the plaintiffs inflate their damage allegation by including punitive damages in the amount alleged as being in controversy, since the class was not certified to seek punitive damages or to recover for costs incurred in connection with inspecting for asbestos-containing materials. The class certification was limited to claims for damages arising from actually friable materials.

exclusive of interest and costs in excess of the jurisdictional minimum.

Notwithstanding the apparently uniform understanding that every plaintiff in a Rule 23(b)(3) class action must independently meet the jurisdictional minimum amount in controversy, and that some plaintiffs in this class action do not meet that requirement, the district court declined to dismiss from the suits plaintiffs whose claims are jurisdictionally insufficient. Instead, the district court concluded that it could "cure" the jurisdictional deficiency after trial by entering judgment on behalf of claims that proved to be in excess of $10,000. As support for this novel approach, the district court cited Rules 12(d) and 12(h)(3). Amazingly, the majority today allows the district court to proceed on that basis. Because there is no authority for postponing the resolution of a jurisdictional failure until *after* trial, I would grant the petition and order the writ of mandamus to issue directing that the amended complaint be dismissed.

At this juncture, I must respond to the majority's criticism that I have unfairly and inaccurately characterized the district court's action respecting the "amount in controversy" question. I state throughout my dissent that the district court has decided to postpone until *after* trial resolution of the jurisdictional questions. Maj. typescript op. at 14. I stand by this characterization.

This class action is certified to resolve the common factual questions that underlie the class members' claims in order to facilitate resolution of asbestos-in-school claims for property damage. Pre-Trial Order No. 235, entered May 17, 1990, identified the following common issues which will be resolved in the first phase of a bifurcated trial:

A. The level at which various kinds of friable asbestos, in various forms, is hazardous in school buildings.

B. Defendants' knowledge of the health hazards of asbestos.

C. Defendants' failure to properly warn or test.

D. Defendants' fraudulent concealment of knowledge of the dangers of asbestos.

E. Defendants' conspiracy to suppress knowledge of the dangers of asbestos.

F. Punitive damages.

G. Common defenses.

Pre-Trial Order No. 235. Resolution of these common factual questions will bring us no closer to determining which plaintiffs must be dismissed because they have jurisdictionally insufficient claims.

Indeed, the district court expressly stated in Pre-Trial Order No. 235 that "Determination of the conduct of any additional phase(s) shall be deferred until the completion of Phase I." Pre-Trial Order No. 235. In other words the identity of the plaintiffs who must be dismissed because they lack jurisdictionally sufficient claims will be deferred until *after* a trial resolving the common factual questions.

A.

Rule 12(d) allows a court to defer until trial certain Rule 12(b) dismissal motions, including a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Rule 12(h)(3) states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

The argument the district court apparently accepted is that it does not appear the court lacks subject matter jurisdiction until a trial on damages demonstrates damages do not exceed the jurisdictional minimum. Hence, the dis-

trict court can defer resolution of the jurisdictional question until it has enough information to reach a supported conclusion. When it appears that the court lacks jurisdiction over a particular plaintiff; that is, at a damages stage trial, the party will immediately be dismissed from the case.

The primary problem with the district court's approach of deferring resolution of the jurisdictional question is that such questions must be resolved at the beginning of a case, not the end. *See Employers Ins. of Wausau v. Crown Cork & Seal Co. Inc.*, 905 F.2d 42, 45 (3d Cir. 1990) ("a federal court is bound to consider its own jurisdiction preliminary to consideration of the merits.") (quoting *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n of Philadelphia*, 657 F.2d 29,36 (3d Cir. 1981)); *See also Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n*, 554 F.2d 1254, 1257 (3d Cir. 1977) ("federal courts should resolve any questions that they may have as to the existence of diversity before proceeding to a decision on the merits.")

Wausau was a diversity action in which the plaintiff insurance company sought a declaration pursuant to the Declaratory Judgment Act of the nature of its obligations arising from certain environmental liabilities that resulted from Wausau's issuance of general liability insurance. One of the defendants (which was not an insurance company) moved to realign the parties so that all the insurance companies with similar interests would be federal plaintiffs. The court declined to make findings on the motion for realignment (which would have created jurisdictional difficulties if granted). Instead, the district court stayed the federal action on the grounds that there was a state action already pending which would litigate the same questions. We vacated the district court's order and remanded for a resolution of the motion to realign. On remand, the district court would be required to resolve any jurisdictional questions before disposing of the case by stay or dismissal. We noted that "[t]he district court's grant of the stay amounts

to the exercise of its dominion over this matter, clearly presupposing that it had subject matter jurisdiction in the first instance. It was therefore bound to first consider [defendant]'s challenge to the diversity between the parties raised in [defendant]'s motion for realignment before it granted the stay." *Wausau*, 905 F.2d at 45. The same is true with respect to the challenge to the district court's subject matter jurisdiction in this case.[3]

Ignoring this Court's long-standing requirement that courts resolve jurisdictional questions at the beginning of a case, the majority relies on a recent decision by the Court of Appeals for the Sixth Circuit for the proposition that a district court may defer until trial the resolution of any jurisdictional questions. *See Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1195-96 (6th Cir. 1988).[4]

---

[3] In requiring that the existence of diversity jurisdiction be resolved at the beginning of the case rather than the end, federal courts espouse well accepted principles of federalism. *See, e.g., Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.")

[4] Although I do not consider it to be a fatal flaw, I note that the majority cites *Sterling* and Rule 12(d) as authority for the proposition that a district court may postpone resolution of the jurisdictional question until a trial on the merits. In this case, the district court has deferred resolution of the jurisdictional question until *after* a trial on the merits and not merely until trial. That difference is substantial because 12(d) is the only authority the majority cites for postponing resolution of the question for so long.

There are situations where factual findings could determine the existence of subject matter jurisdiction in a diversity case. For instance, where there is a dispute about the location of a corporation's principal place of business and resolution of that dispute will determine whether diversity exists, it might make sense to defer resolution of that question until trial. *See, e.g., Village Fair Shopping Center Co. v. Sam Broadhead Trust*, 588 F.2d 431, 433 (5th Cir. 1979) (as regards diversity jurisdiction, the determination of a corporation's principal place of business

In *Sterling*, certain class action plaintiffs failed to allege in their complaints that they had claims in excess of the jurisdictional minimum for diversity cases. In response to defendant's motion under Rule 12(b)(1) to dismiss for want of subject matter jurisdiction, the district court, relying on Rules 12(d) and 12(h)(3), deferred resolution of the jurisdictional question until trial. The Sixth Circuit affirmed. At first blush, *Sterling* appears to support the majority's reading of Rules 12(d) and 12(h)(3). The facts of *Sterling*, however, reveal that *Sterling* does not contravene our long-standing rule that jurisdictional questions should be resolved before proceeding to the merits. *See Wausau*, 905 F.2d at 45; *Carlsberg*, 554 F.2d at 1257.Indeed, *Sterling*'s holding that the jurisdictional question may be deferred until trial is completely consistent with our holdings in *Wausau* and *Carlsberg*.

Rule 12(h)(3) requires that the district court dismiss an action "*[w]henever* it appears . . . that the court lacks jurisdiction of the subject matter. . . ." Fed. R. Civ. P. 12(h)(3) (emphasis added). When the defendants made the motion to dismiss for lack of subject matter jurisdiction

---

is a question of fact). Nevertheless, the existence of a dispute as to a corporation's place of business would not excuse compliance with Rule 8(a)(1) which requires plaintiffs to plead in their complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." Where a plaintiff fails to show the grounds for federal jurisdiction in his complaint, the court must dismiss the case, unless the defect can be corrected by amendment. *Smith v. McCullough*, 270 U.S. 456, 459 (1926); *Randazzo v. Eagle-Picher Indus., Inc.*, 117 F.R.D. 557, 558 (E.D. Pa. 1987).

In the case before us, plaintiffs have failed to make sufficient jurisdictional allegation with respect to the amount in controversy of each represented plaintiff. Because plaintiffs have admitted this in their amended complaints, there is no factual question to resolve. The only question is which plaintiffs must be dismissed—not whether any plaintiffs will have to be dismissed. If plaintiffs cannot amend their complaints to make jurisdictionally sufficient allegations, their cases should be dismissed entirely.

in *Sterling*, there was no basis in the record for believing that any plaintiff would be unable to prove claims in excess of the jurisdictional minimum. Quite the contrary, it appeared that every plaintiff had a claim well in excess of the jurisdictional minimum. *Sterling*, 855 F.2d at 1195. The district court in *Sterling* decided that it was not required to dismiss plaintiffs who failed to allege claims in excess of the jurisdictional minimum when the court had no reason to doubt that any plaintiff would fail to prove a claim in excess of the amount required.

The plaintiffs whose pleading allegations were challenged in *Sterling* were plaintiffs either by virtue of the fact that they did not opt out of the class or had been permitted to join the representative plaintiff class under Rule 20(a). Counsel for the plaintiffs argued that it was unnecessary for the plaintiffs who joined the suit by failing to opt out to allege claims in excess of the jurisdictional minimum, since the original plaintiffs had already claimed jurisdictionally sufficient damages and the non-opt-out plaintiffs adopted the original plaintiff's *ad damnum* clause when they joined the suit.[5]

Sterling is a case about pleading rules.[6] No one in *Sterling* expressed serious doubt that any plaintiff, however he became part of the suit, would fail to demonstrate a claim in excess of the jurisdictional minimum. Indeed, plaintiff's counsel assured the court that each plaintiff had claims in excess of the minimum. *Sterling*, 855 F.2d at 1194-95.

---

[5] The case does not indicate how plaintiffs' counsel responded to the objection that the plaintiffs who joined the suit under Rule 20(a) failed to allege jurisdictionally sufficient damages.

[6] To the extent that *Sterling* implies that it is ever permissible for a plaintiff's complaint to lack a jurisdictionally sufficient claim on its face, I disagree. It is the long standing rule that jurisdiction must exist on the face of a complaint in accordance with Rule 8(a)(1). *Smith v. McCullough*, 270 U.S. 456 (1926).

In this case, by contrast, plaintiffs have not only failed to allege that every plaintiff has a claim in excess of the jurisdictional minimum, but plaintiff has admitted in its amended complaint that some plaintiffs do not meet the jurisdictional minimum. Furthermore, defendants have introduced uncontradicted evidence that as much as 60% of the plaintiff class cannot meet the jurisdictional requirement. Plaintiffs cannot invoke Rules 12(d) and 12(h)(3) to save their suit because Rule 12(h)(3) requires that the court dismiss the suit "[w]*henever* it appears . . . that the court lacks jurisdiction of the subject matter . . . ." Fed. R. Civ. P. 12(h)(3) (emphasis added). It appears that the district court lacks jurisdiction *now*.[1] Accordingly, following the mandate of Rule 12(h)(3), *Carlsberg*, and even *Sterling*, the district court must require that the jurisdictional infirmities be cured *now*.

The majority's reliance on *Sterling* is also misplaced because 28 U.S.C.A. § 1332 does not contemplate dismissal for lack of jurisdiction where a plaintiff has failed to establish damages for less than the jurisdictional minimum after trial. If a prevailing plaintiff fails to establish dam-

---

[1] The majority opinion has created a paper tiger by concluding that Rule 12(d) cannot be given effect unless we read Rule 12(h)(3) as conferring the power to dismiss for lack of subject matter jurisdiction on this court and Rule 12(d) states when that power may be exercised. The majority insists that any other reading of Rule 12(h)(3) would nullify the plain language of Rule 12(d). I disagree.

Professor Wright has explained when a jurisdictional challenge should be deferred. "If . . . a decision of the jurisdictional issue requires a ruling on the merits of the case, the decision should await a determination of the merits . . . ." 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § *1350, at 225 (1990)* (collecting cases); *Id.*, § 1373, at 552-54 ("because of its significance, a defense of lack of subject matter jurisdiction usually will receive a hearing, unless its resolution cannot be achieved without a consideration of the merits of the action.") (collecting cases). I think that Professor Wright's construction of Rules 12(d) and 12(h)(3) gives effect to both rules without the strained logic the majority opinion requires.

ages meeting the minimum amount in controversy for diversity cases after trial, 28 U.S.C.A. § 1332(b) (1966 & Supp. 1990) authorizes the district court to deny plaintiff his costs, or even to impose costs on the prevailing plaintiff. 28 U.S.C.A. § 1332(b).* If the majority were correct in its analysis of Rules 12(b)(1), 12(d), and 12(h)(3), and its conclusion that a district court may postpone resolution of jurisdictional questions until after trial, 28 U.S.C.A. § 1332(b) would make no sense. Under the majority's reading of these authorities, if a plaintiff were awarded damages for less than the jurisdictional minimum after trial, the district court would dismiss the case for lack of subject matter jurisdiction. But that view was soundly rejected by the Supreme Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (a case cannot be dismissed for lack of jurisdiction if it contains a jurisdictionally sufficient allegation, but the plaintiff recovers less than the jurisdictional minimum). Either the district court has jurisdiction and a plaintiff with an inadequate claim is subject to an assessment of costs or the court lacks jurisdiction and the case must be dismissed. Since section 1332(b) explains what course to take if a prevailing plaintiff proves an inadequate claim after trial, it makes no sense to hold that the plaintiff's claim can be dismissed at that stage for lack of subject matter jurisdiction. Because I believe the district court is proceeding beyond its jurisdictional sphere by going to the merits without either dismissing the case or, at least, the plaintiffs whose claims are insufficient, I would issue the writ of mandamus.

---

* 28 U.S.C.A. § 1332(b) read in relevant part:

> (b) Except where express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000 . . . the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff . . . .

B.

The majority has made much of the rule that a case will not be dismissed for lack of subject matter jurisdiction unless it appears to a "legal certainty" that the plaintiffs' claim is insufficient. In support of that proposition, the majority cites *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. at 289. *Red Cab* involved a case which had been removed from state court to federal court. Jurisdiction was invoked under the diversity statute then in effect which required that the plaintiff have at least $3000 in dispute. In the original state action, the plaintiff demanded $4000 and other appropriate relief. *Id.* at 285. After the case was removed to federal court, the plaintiff filed a second amended complaint which again alleged damages of $4000 resulting from an alleged breach of contract. Plaintiff had attached an appendix to the second amended complaint which listed specific amounts of damages resulting from the alleged breach of contract. The appendix, however, indicated damages of only $1,380.89. At trial the plaintiff prevailed, but the damage award was for only $1,162.98. *Id.* at 285.

On appeal, the Court of Appeals refused to decide the case on the merits because the plaintiff had a jurisdictionally insufficient claim after trial. The Supreme Court reversed on the ground that a complaint need only contain a good faith allegation that there is a jurisdictionally sufficient claim. *Id.* at 288 ("The rule governing dismissal for want of [subject matter] jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith."). In the case before us, plaintiffs have failed to plead jurisdictionally sufficient claims because, as they candidly admitted, they could not make such an allegation in good faith. *Red Cab* contains no authority for the proposition that the "legal certainty" test will save a pleading which is inadequate on its face.

Rather, the rule of *Red Cab* is that a case will not be dismissed for lack of subject matter jurisdiction where a plaintiff at trial has proven damages which are less than the jurisdictional minimum, notwithstanding the fact that if the plaintiff had alleged only that insufficient amount in the original complaint, the court would have been compelled to dismiss for lack of subject matter jurisdiction. This rule is entirely consistent with the language of 28 U.S.C.A. § 1332(b), which imposes costs on a prevailing plaintiff who after trial has failed to recover a claim that would be jurisdictionally sufficient.

This Court's "legal certainty" test in *Nelson* is not to the contrary. *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971). In *Nelson*, three plaintiffs sued in federal court to recover for personal injuries they sustained in an automobile accident allegedly caused by defendant's negligence. Jurisdiction was invoked on the basis of diversity of citizenship. Although the plaintiffs' complaint apparently had jurisdictionally sufficient claims in its *ad damnum* clause, we looked to the facts averred in support of the complaint and concluded that the trial court had not erred in dismissing the case for lack of subject matter jurisdiction. We agreed that the plaintiffs had failed to allege facts that could conceivably support even a single claim for $10,000. As a result, we concluded that defendants had shown to a "legal certainty" that plaintiffs' claims were insufficient. We therefore affirmed the dismissal for lack of subject matter jurisdiction.

Our holding in *Nelson* is entirely consistent with the rule that, *at a minimum*, plaintiffs must have allegations that are jurisdictionally sufficient. Indeed, in *Nelson*, we held that a jurisdictionally sufficient allegation was not enough—the plaintiff must also allege facts that at some level support a claim that is jurisdictionally sufficient. That is why we affirmed the dismissal in *Nelson*. It bears repeating: plaintiffs concede in their amended complaint that they lack jurisdictionally sufficient claims. We have no

choice but to dismiss the actions or, at least, to require that plaintiffs file complaints which comply with 28 U.S.C.A. § 1332. The majority's conclusion today that dismissal is not required has no basis in any decision of any federal court at any time.

Moreover, even if I were willing to yield to the majority's distortion of the "legal certainty" test, I would conclude that petitioners have met their burden of proving to a legal certainty that plaintiffs claims are jurisdictionally insufficient. First, plaintiffs admit exactly that in the amended complaint. Second, petitioners have introduced unrefuted evidence that as much as 60% of the plaintiff class has a claim for less than the jurisdictional minimum. At oral argument, plaintiffs repeatedly stressed that there were at least 16,000 members of the class who had claims in excess of the jurisdictional minimum. This class contains over 35,000 plaintiffs. It remains the law that, "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.' " *Zahn*, 414 U.S. at 301 (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)). *See also Snyder*, 394 U.S. 332 (separate claims in a class action suit could not be aggregated for the purpose of meeting the jurisdictional minimum amount in controversy requirement). That leaves over 17,000 claims of plaintiffs for which the court lacks jurisdiction. The majority's conclusion that the defendants have failed to show that the plaintiffs' claims are jurisdictionally insufficient to a "legal certainty" is incredible in light of (1) plaintiffs' admission in their amended complaint and (2) defendants' uncontradicted evidence that 60% of the plaintiff class have damages less than the jurisdictional minimum.

The majority claims that "[p]ostponing dismissal of such plaintiffs not only appears prudent, but it meshes with our policy [of dismissing only those 'flagrant' cases where it

can be determined in advance 'with legal certainty' that the jurisdictional minimum is not satisfied]." Maj. typescript op. at 16 (citation omitted). But, there is no reason in this litigation to relax the rule in *Zahn*, even if we had that power. Indeed, policy considerations, even if they were relevant in jurisdictional matters, suggest that the rule in *Zahn* should be vigorously applied.

In the event that defendants prevail after a trial on the merits, individual plaintiffs could avoid the preclusive effect of an adverse decision with respect to the common questions of law and fact by proving that they never had a claim in excess of $10,000. It is even possible that plaintiffs whose claims do exceed $10,000 could attack an adverse decision collaterally by later alleging that the class was defective because so many members lacked claims for more than $10,000 that the class action should have been dismissed. For all these reasons, I believe that we have a constitutional duty to grant the mandamus relief petitioners have requested.

II.

The district court refused to dismiss the present case although it was discovered that the plaintiff class included plaintiffs who were not diverse from all defendants. The district court ruled that "if one member of a class is of diverse citizenship from the class' opponent, and no non-diverse parties are named parties, federal jurisdiction is proper. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969); *see also In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987)." Memorandum and Order at 5-6, filed with Pretrial Order No. 197 in *In re School Asbestos Litig.*, No. 83-0268 (E.D. Pa., filed Nov. 15, 1989). Recently, Justice O'Connor expressed the same view in her dissent in *Carden v. Arkoma Assocs.*, 110 S.Ct. 1015, 1023 (1990) (O'Connor, J., dissenting).

The authority cited by the district court supports its conclusion that complete diversity is not jurisdictionally

required. Notwithstanding Justice O'Connor's dissent in *Carden* (which was not a suit involving class actions), recent decisions of the Supreme Court undermine that conclusion.[9]

In order for an inferior court to have jurisdiction over any matter, it must have both constitutional and statutory authority. *See Finley v. U.S.*, 109 S.Ct. 2003, 2006 (1989) ("It remains rudimentary law that '[a]s regards all courts of the United States inferior to this tribunal, two things

---

[9] I dismiss as incorrect the majority's contention that it need not reach defendant's claim of pendent-party jurisdiction because its decision is that diversity jurisdiction exists under section 1332(a) for these class action suits. *See* maj. typescript op. at 12. It is beyond dispute that there is no subject matter jurisdiction in diversity cases where there is incomplete diversity between plaintiffs and defendants. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Since I doubt that the majority would attempt to overrule the Supreme Court on this or any other point, I must construe the majority's statement that the exercise of jurisdiction over non-diverse class action plaintiffs is permissible under section 1332(a) as a statement that the non-diverse class action plaintiffs fall within the court's pendent-party jurisdiction. *See, e.g., Finley v. U.S.*, 109 S.Ct. at 2006 (pendent-party jurisdiction is "jurisdiction over parties not named in any claim that is independently cognizable by the federal court"). In other words, the exercise of jurisdiction over parties where the court otherwise lacks subject matter jurisdiction is pendent-party jurisdiction—to say that a federal court can exercise jurisdiction over non-diverse parties in a Rule 23(b)(3) class action is to say that the federal court has pendent-party jurisdiction over the non-diverse plaintiffs.

As it stands, the majority seems to suggest that there is a special kind of jurisdiction known as class action jurisdiction which amounts to an exception to the rule requiring complete diversity where jurisdiction is based on diversity of citizenship. This suggestion implies that Rule 23 somehow enlarges the jurisdiction of federal courts in diversity cases. "[I]t is axiomatic, [however,] that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). *See also* Fed. R. Civ. P. 82. Again, I can only presume that the majority opinion rests on the conclusion that 28 U.S.C. § 1332(a) contains a statutory grant of power for federal courts to exercise pendent-party jurisdiction.

are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* . . . . To the extent that such action is not taken, the power lies dormant.' " (quoting *The Mayor v. Cooper*, 6 Wall. 274, 252 (1868)).

To determine whether jurisdiction exists in any case, the court must first ascertain whether it has a constitutional grant of power over the subject matter. The Constitution extends the judicial power to "all Cases . . . arising under this Constitution, the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States . . ." U.S. Const. art. III, § 2. The case before us now concerns the power of a federal court to exercise jurisdiction in a diversity suit over parties over whom there is no independent basis for jurisdiction (because of a lack of complete diversity).

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) is the seminal case on the scope of the constitutional grant of jurisdictional power. *Gibbs* concerned the power of a federal court to retain jurisdiction of a state law claim after it dismissed the federal claim on which federal jurisdiction had been based. As such, *Gibbs* is properly classified as a case about pendent-claim jurisdiction (the power of a federal court to hear claims for which there is no independent basis for federal jurisdiction), while the case we have before us is pendent-party jurisdiction (the power of a federal court to hear actions concerning parties for whom there is no independent basis for jurisdiction).

Gibbs set forth a broad reading of the constitutional grant of jurisdictional power.

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority***, U.S. Const., Art. III, § 2, and the re-

> lationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'

Gibbs 383 U.S. at 725 (footnote omitted). The relationship between the state and federal claim permit the conclusion that they comprise one constitutional case when they "derive from a common nucleus of operative fact." *Id.* The test for whether the two claims derive from a "common nucleus of operative fact," is "if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.* (footnote omitted).

Although it is by no means an easy question, I am willing to assume that all claims at stake in this class action derive from a common nucleus of operative fact such that there is before us one constitutional case. Accordingly, I agree that we have constitutional power to hear this case. Constitutional power, however, is not enough.

The next step is to determine how much of this constitutional grant of power has been congressionally authorized in 28 U.S.C.A. § 1332(a). *See Finley*, 109 S.Ct. at 2007 ("Our cases show . . . that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.") From as early as the Judiciary Act of 1789, in which Congress first authorized federal courts to exercise diversity jurisdiction, the Supreme Court has interpreted the legislative grant of jurisdictional power to hear diversity suits to require "complete diversity" of citizenship. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *See also Carden*, 110 S.Ct. at 1017 (1990).

Following the doctrine requiring complete diversity, the Supreme Court has refused to read 28 U.S.C.A. § 1332(a) as granting federal courts power to exercise pendent-party jurisdiction in diversity cases. In *Zahn v. International Paper, supra*, the Court refused to allow class action plaintiffs to aggregate their claims to satisfy the jurisdictional minimum amount in controversy, notwithstanding the fact that all the claims together amounted to a single constitutional case under *Gibbs*. *See Finley*, 109 S.Ct. at 2007. Professor Moore has written, based on the reasoning of *Zahn*, "the citizenship of each member of the class must be considered." 1990 *Moore's Federal Practice Rules Pamphlet*, ¶ 23.18 at 253. In *Kroger*, 437 U.S. 365, another diversity case, the Court refused to permit the plaintiff to assert a claim directly against a non-diverse third party, although the Court recognized that the controversy involved one constitutional case under the *Gibbs* test. Thus, the Supreme Court has not read 28 U.S.C.A. § 1332(a) to confer the power on federal courts to exercise jurisdiction over parties for whom there is no independent basis for jurisdiction in diversity cases.

The only time that the Supreme Court has ever exercised anything that even looks like pendent-party jurisdiction in a class action diversity suit was in 1921. In *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), the Court held that unnamed plaintiff members of a class action suit who had lost their suit in federal court were precluded from suing again in state court based on the same underlying claim. The class action plaintiffs argued that they were not bound by the decision in the first case because joinder of them in the first case would have destroyed complete diversity in the federal class action. The Court held that the plaintiffs were barred from suing again because they were properly represented in the first suit. *Id.* at 367.

Ben-Hur has been characterized by the Supreme Court as an example of "ancillary jurisdiction," which the Court

then described as a doctrine "bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." *Aldinger v. Howard*, 427 U.S. 1, 11 (1976). Under the modern class action rules, *Ben-Hur* would be a Rule 23(b)(1) class action, since the dispute involved indivisible claims of class members to a common fund. Accordingly, the reasons for the decision in *Ben-Hur* are not controlling here.

The Supreme Court on two occasions has dealt with the question whether a federal court could exercise pendent-party jurisdiction over parties for whom there was no independent basis for jurisdiction in class action diversity suits. The first was in *Snyder*, 394 U.S. 332. In *Snyder*, the Court stated in *dicta*, "Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State." *Id.* at 340 (citing *Ben-Hur*, 255 U.S. 356). *Snyder* is not, however, controlling on this issue, since the controversy in that case concerned the power of a federal court to exercise pendent-party jurisdiction over class action plaintiffs whose claims were for less than the jurisdictional minimum amount in controversy. In *Snyder*, the Court held that there was no subject matter jurisdiction and dismissed the case. There was no question presented there about the power of the Court to exercise jurisdiction over the claims of non-diverse class action plaintiffs. As a result, although we must respect reasoned *dicta* of the Supreme Court, *see, e.g., Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120, n.8 (7th Cir. 1989), we are not bound to follow the *Snyder* Court's conclusion since that was not the issue addressed. *See also In re Permian Basin Area Rate Cases*, 390 U.S.

747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases").

The second instance where the Supreme Court mentioned the question whether a federal court could exercise pendent-party jurisdiction over parties for whom there was no independent basis for jurisdiction was in Justice O'Connor's dissent in *Carden*, 110 S.Ct. at 1023. Unlike *Snyder*, *Carden* was not even a case about class actions. The dispute in *Carden* was whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be considered in determining diversity of citizenship among the parties. *Carden*, 110 S.Ct. at 1016. The majority answered in the affirmative, the dissent disagreed. There was no discussion in *Carden* about pendent-party jurisdiction—everyone agreed that there had to be complete diversity between all plaintiffs and all defendants. The inquiry was whether citizenship of the limited partners mattered for the purpose of determining the citizenship of the artificial entity known as the limited partnership. There was no question before the Supreme Court about the need for an independent basis of jurisdiction for every plaintiff in court. The only question was whether partnerships should be treated like corporations for the purpose of determining citizenship. Accordingly, even if the dissent had been the majority opinion in *Carden*, we would not be bound by the statement that only the citizenship of the named plaintiffs matter in Rule 23 class actions. We are, of course, not bound by a dissent to a Supreme Court opinion.

Recently, another Court of Appeals addressed a similar issue to the one before this Court. In *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 161-62 (2d Cir. 1987), the court held that under long-standing Supreme Court doctrine, "complete diversity is required only between the named plaintiffs and the named defendants in a federal class action." *Id.* at 162. While I recognize that *In re Agent Orange* directly supports plaintiffs' jurisdictional theory, I

believe that its vitality has been totally undermined by the Supreme Court's decision in *Finley*.

Finley reminds us that federal courts must have both a constitutional and statutory basis for exercising jurisdiction. While we might assume under *Gibbs* that the district court had the constitutional power to hear the case, the same is by no means true of the statutory power authorized by 28 U.S.C.A. § 1332(a). The question boils down to whether section 1332(a) can be read as containing an authorization by Congress for federal courts to exercise jurisdiction over parties over whom there is no independent basis of jurisdiction, *i.e.*, where complete diversity is lacking. I do not believe it can.

In case after case, the Supreme Court has refused to allow federal courts to exercise pendent-party jurisdiction over parties for whom there was no independent basis for federal jurisdiction in diversity cases. *See, e.g., Kroger; Zahn; Snyder;* and *Strawbridge v. Curtiss.* In light of Supreme Court precedent that has consistently refused to read 28 U.S.C.A. § 1332(a) as containing an authorization for federal courts to exercise pendent-party jurisdiction over parties where complete diversity is lacking, I conclude that the district court must dismiss these cases for lack of subject matter jurisdiction.

III.

These three class actions should have been dismissed by the district court for lack of subject matter jurisdiction. Defendants have introduced unrefuted evidence that as much as 60% of plaintiff class cannot meet the jurisdictional minimum amount in controversy required by 28 U.S.C.A. § 1332(a). Plaintiffs have even conceded this in the complaint. Inasmuch as the Supreme Court has long held that every plaintiff with a distinct claim must meet the jurisdictional minimum requirement even in class action suits, the case should be dismissed. Nor am I per-

suaded by the majority's articulation of a "legal certainty" test that defendants have failed to meet. Even the most stringent (and distorted) version of this test which would waive the requirement that the plaintiff plead facts which support an allegation that the federal court has jurisdiction over the subject matter shows to a "legal certainty" that the majority of plaintiffs represented in this class action have claims for less than the jurisdictional minimum.

In addition to the fact that the district court lacks subject matter jurisdiction because of jurisdictionally insufficient claims, this class action also violates the requirement that there be "complete diversity" between all plaintiffs and all defendants. Because complete diversity is lacking between members of the plaintiff class and named defendants, the case should have been dismissed for lack of subject matter jurisdiction.

I would grant the writ of mandamus defendants have requested.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

FILED

NOV 15 1989

MICHAEL E. KUNZ, Clerk

MEMORANDUM AND ORDER

J. M. KELLY, J. NOVEMBER 14, 1989

Procedural Background

On May 1, 1989, following oral argument, this court entered Pretrial Order No. 191 directing the plaintiffs to file amended pleadings curing the allegational deficiencies brought to the attention of the court by defendants Kaiser Gypsum Company, Inc., United States Gypsum Company and a number of undersigned defendants in various motions to dismiss. On May 30, 1989, the plaintiffs filed amended complaints in this cause of action. On June 13, 1989, certain defendants filed a motion to dismiss and to strike the allegations of class representation from the amended complaints for failure to plead subject matter jurisdiction. On June 16, 1989, defendant Fibreboard Corporation filed a motion to dismiss for lack of subject matter

jurisdiction.[1] The parties have completed the process of filing briefs responsive to the jurisdictional issue before the court.

Discussion

I will address, in turn, the central arguments of the defendants. First, defendants argue that any class action under Fed. R. Civ. P. 23(b)(3) whose jurisdiction is founded upon 28 U.S.C. § 1332(a) cannot include plaintiffs whose claims do not amount to or exceed the sum of ten thousand dollars ($10,000). In *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973), the Court held that district courts are required to dismiss from the class action any specific class member who does not meet the amount in controversy requirement. *Zahn* does not require that the entire class action be dismissed for lack of subject matter jurisdiction over the unnamed members who do not have a claim for $10,000 or more. The applicable standard requires that it appear to a "legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (footnote omitted). Although this court has no affirmative obligation to police the damages claims, by admission of the plaintiffs, the court has cause to inquire as to the sufficiency of the claims of putative class members. *See In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987). In this case, it is uncertain which plaintiffs, if any, should be dismissed. Fed. R. Civ. P. 12(d) permits a district court to defer until trial jurisdictional questions raised by a mo-

[1] Additional defendants have moved separately to dismiss the amended complaints for lack of subject matter jurisdiction. These additional motions incorporate by reference the arguments made in the motions to dismiss discussed above. The moving defendants are: Combustion Engineering, Inc., Pittsburgh Corning Corp., United States Gypsum Co., Wilkin Insulation Co., Asbestos Corp. Ltd., and Bell Asbestos Mines, Ltd.

tion filed under Fed. R. Civ. P. 12(b)(1) (lack of jurisdiction over the subject matter).[2] Kaiser Gypsum Company, Inc.'s motion is a Rule 12(b)(1) motion; however, the motion of undersigned defendants is filed pursuant to Rule 12(h)(3). According to Federal Rule of Civil Procedure 12(h)(3):

> a question of subject matter jurisdiction may be presented by any interested party at any time, either by motion or in the answer. Furthermore, it may be interposed as a motion for relief from a final judgment under Rule 60(b)(4) or presented for the first time on appeal. As was stated by the court in *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 169 F.Supp. 774 (D.C. Cal. 1958), *reversed on other grounds*, 362 U.S. 73 (1960): If Federal jurisdiction is not apparent, the Court not only will, but must, refuse to proceed with the determination of the merits of the controversy, *unless this failure can be cured.*"

Wright & Miller, Federal Practice and Procedure § 1393 (footnotes and quotations omitted) (citation and emphasis added).

Any potential jurisdictional problems raised in this case can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000. Caselaw supports postponement.

In *Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988), defendant Velsicol filed two separate Rule 12(b)(1) motions prior to trial arguing that the district court lacked subject

---

[2] Fed. R. Civ. P. 12(d) states in relevant part:

> The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading of by motion . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

matter jurisdiction because certain representative plaintiffs and putative class members did not allege that the amount in controversy between each of them and the defendants exceeded $10,000. Velsicol further argued that the district court was required to immediately consider the sufficiency of each plaintiff's claim and dismiss all of those plaintiffs unable to demonstrate a valid claim at that time. The district court deferred the jurisdictional decision with regard to the representative class members until the trial and until the second phase of the trial with regard to the absent class members. The Court of Appeals for the Sixth Circuit affirmed the district court's deferring resolution of the jurisdictional question raised by the defendants' motions. The district court stated:

> [It] also seems to me that it is not necessary at this point for the court to wholesale order a dismissal of all those potential class members who may not at this point have pleaded, because it seems to me that that's a matter that might well come up at some point down the road after the initial phase of the case is tried. . . . [W]hen you get down to establishing amounts in a case such as this, where there is a jury trial, it puts a burden on the court that the court really doesn't want to undertake, and that is an assessment of claims at this point to try and make a determination of whether a jurisdictional amount, in fact, can be asserted at this point. . . .

855 F.2d 1188, 1195 n. 5 (6th Cir. 1988).

Defendants refer to the United States Environmental Protection Agency (EPA) Report,[3] as support for the proposition that approximately sixty percent (60%) of the class member school districts do *not* have a claim in excess of the jurisdictional amount requirements. In other words, the

---

[3] EPA, *Evaluation of the Asbestos-in-Schools Identification and Notification Rule*, October, 1984 at XI.

defendants argue that the EPA reported that only 40% of the nation's public school districts and private schools had friable asbestos-containing materials in one or more of their buildings. Plaintiffs respond that the EPA Report does not reflect the fact that, over time, the asbestos that is now known to exist in a percentage of the school buildings, but which is not yet friable, will inevitably become friable. Assuming for the sake of argument that defendants' position is correct, that only 40% of the plaintiff school districts have a claim, the identify of those plaintiffs is still unknown. As discussed above, the best solution is to await trial for the determination of which specific school districts must be dismissed.

Defendants argue that each member of the class must be of diverse citizenship from each defendant in the case. This argument is contrary to law. Long-established Supreme Court precedent establishes that if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse parties are named parties, federal jurisdiction is proper. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969); see also In re Agent Orange Products Liability Litigation, 818 F.2d 145, 162 (2d Cir. 1987).

Defendants argue that this court's subject matter jurisdiction is limited by the "local action" doctrine to claims related to property located in Pennsylvania because the doctrine applies to any action directly affecting land and real property. The two main cases cited by defendants, *Dayton Independent School District v. U.S. Mineral Products Co.*, 1987 U.S. Dist. Lexis 6749, (E.D. Tex. 1987) and *Prudential Insurance Co. v. United States Gypsum Co.*, (D.N.J. 1989) (87-4227), involved various products liability and tort claims related to asbestos-containing materials found in buildings. The *Prudential* court assumed, without deciding, that the issue raised was a jurisdictional question;[4] both cases held that the claims were more appro-

---

[4] The local action doctrine has been described both as an issue of

priately characterized as "transitory" and not "local" in nature because the remedy sought was monetary damages and not recovery of possession of title to real property.

Defendants distinguish *Dayton* and *Prudential* from the case before us by point out that questions as to title are present in our case. Defendants suggest that questions regarding the ownership of some of the school buildings in question have been raised since the litigation commenced. For example, defendants suggest that over the years, various school buildings have been sold and the new owners have not been included on the class notice mailing lists.

In the amended complaints, the plaintiffs allege claims of negligence, strict liability, breach of warranties, concert of action, civil conspiracy, intentional tort, restitution and malicious, reckless misconduct. These largely tort claims are, as described above, considered "transitory" in nature. The relief sought in the amended complaints is for monetary damages. Therefore, the local action doctrine does not apply. It is possible that questions related to ownership of some particular buildings may arise later in the litigation. Those particular school districts could be dismissed for lack of subject matter jurisdiction at that point if indeed the local action doctrine is shown to apply. It is premature for the Court to dismiss the amended complaints for lack of subject matter jurisdiction on the basis of the "local action" doctrine as the amended complaints allege claims not bound to any issues of title or possession of real property.

An appropriate order follows.

---

subject matter jurisdiction and a question of venue. *Compare Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 290-91 (5th Cir. 1987) (question of subject matter jurisdiction) *with Ralph J. Musicus, Inc. v. Safeway Stores, Inc.*, 743 F.2d 503, 506 (7th Cir. 1984) (question of venue).

APPENDIX G

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

January 9, 1991

No. 90-1247

Re: In Re: School Asbestos Litigation

School Dist. Lancaster et al vs. Lake Asbestos Quebec et al.
Kaiser Cement Corporation, Appellant

Dear Counsel:

Enclosed herewith is conformed copy of Order filed today in the above-entitled case.

Very truly yours,

Sally Mrvos, Clerk

By /s/

M. Elizabeth Ferguson
Chief Deputy Clerk
Direct Dial 597-8465

bj
enc
cc: D.J.Ryan,Jr.Esq.
F.B.Lacey,Esq.
E.W.Madeira Jr.Esq.
D.Berger,Esq.
A.Levin,Esq.
H.B.Newberg,Esq.
M.L.Hardy,Esq.

S.H.Newberger,Esq.
M.S.Boast,Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1247

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
and NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD.,
THE CELOTEX CORPORATION, RAYMARK INDUSTRIES,
INC.,
UNION CARBIDE CORP., ASBESTOSPRAY CORP.,
SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO.,
SPRAYED INSULATION, INC., ASBESTOS FIBRES INC.,
DANA CORPORATION, U.S. GYPSUM,
U.S. MINERAL PRODUCTS COMPANY,
SPRAYON INSULATION & ACOUSTICS, INC.,
SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO.,
INC.,
WILKIN INSULATION COMPANY, W.R. GRACE & CO.,
OWENS-CORNING FIBERGLAS CORPORATION,
STANDARD INSULATION, INC.,
NORTH AMERICAN ASBESTOS CORPORATION,
CASSIAR RESOURCES LTD., BELL ASBESTOS MINES,
LTD.,
ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE
CORP.,
OWENS-ILLINOIS, INC., TURNER & NEWALL LIMITED,
THE FLINTKOTE CO., FIBREBOARD CORPORATION,
GAF CORP., UNIROYAL, INC., CAPE ASBESTOS,
PFIZER, INC., KAISER CEMENT CORPORATION,
BES-TEX, INC., GEORGIA-PACIFIC CORP.

Kaiser Cement Corporation,
Appellant

(D.C. Civ. No. 83-00268)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge,*
SLOVITER, BECKER, STAPLETON,
MANSMANN, GREENBERG, HUTCHINSON, SCIRICA,
COWEN,
NYGAARD, ALITO and ALDISERT*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge Hutchinson would grant rehearing by the court in banc. Judge Cowen would grant rehearing by the court in banc for the reasons set forth in his dissent.

BY THE COURT,

/s/

Circuit Judge

Dated: Jan. 9 1991

* As to panel rehearing only.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

NOTICE OF CLASS ACTION LITIGATION RELATING TO SCHOOL ASBESTOS CLAIMS

This Notice is being sent to you pursuant to an Order of the United States District Court for the Eastern District of Pennsylvania and Rule 23(c)(2) of the Federal Rules of Civil Procedure. The purpose of this Notice is to inform you of the pendency of a class action in which you are a member of a class. You are being informed of these matters so that you may make appropriate decisions as to what steps you may wish to take in relation to this litigation.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. OTHER THAN THE NOTICE OF A PROPOSED PARTIAL SETTLEMENT WITH TWO DEFENDANTS IN THIS LITIGATION, OWENS-ILLINOIS, INC. AND PROKO INDUSTRIES, INC., THIS IS THE FIRST COURT NOTICE YOU HAVE RECEIVED OF THIS ACTION, REGARDLESS OF WHAT OTHER NOTICES YOU MAY HAVE RECEIVED IN THE PAST CONCERNING THE PRESENCE OF ASBESTOS IN SCHOOL BUILDINGS OR ANY OTHER LEGAL PROCEEDING. FURTHER, THIS NOTICE IS NOT TO BE CONFUSED WITH THE FORM OF PROOF OF CLAIM FOR PROPERTY DAMAGE CLAIMANTS WHICH MAY HAVE BEEN SENT TO YOU BY ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE MANVILLE CORPORATION BANK

RUPTCY. THE MANVILLE CORPORATION IS NOT A DEFENDANT IN THIS CLASS ACTION. PRESENTLY, ALL PROCEEDINGS REGARDING MANVILLE ARE BEING HANDLED BY THE BANKRUPTCY COURT.

1. There are now pending in the United States District Court for the Eastern District of Pennsylvania claims brought by the following school districts: The School District of Lancaster (Pennsylvania), the Manheim Township School District (Pennsylvania), the Lampeter-Strasburg School District (Pennsylvania), the Barnwell School District No. 45 (South Carolina), the Board of Education of the Memphis City Schools (Tennessee), and the Napa Valley Unified School District (California). These plaintiffs have brought suit on behalf of themselves, all public and non-profit private, elementary and secondary schools and school districts throughout the United States.

The complaints allege that friable asbestos-containing products have been used in school buildings. The complaints seek compensatory damages, punitive damages, and equitable relief, and allege that the defendants should bear the cost of identification, analysis, repair, removal, and replacement of the products. Plaintiffs' theories of liability include negligence, strict liability in tort, breach of warranty, intentional tort, concert of action, and civil conspiracy.

2. The defendants are as follows:

ACandS, Inc.
Armstrong World Industries, Inc.
Asbestospray Corp.
Asbestos Corporation Limited
Asbestos Fibres, Inc.
Asten Group, Inc.
Basic, Inc.
Bell Asbestos Mines, Ltd.
Benjamin Foster Co., Division of Amchem Products
Bes-Tex, Inc.
Brinco Mining Ltd., formerly known as Cassiar Resources Ltd.
C. Tennant & Sons
Cape Asbestos
Carey-Canada, Inc.
Combustion Engineering, Inc.
Dana Corp.
Eagle-Pitcher Industries, Inc.
Empire Ace Insulation Manufacturing Corp.
Fibreboard Corporation
GAF Corp.
Georgia-Pacific Corp.
H.K. Porter Co.
J.W. Roberts, Ltd.
Kaiser Gypsum Co., Inc.
Kaiser Cement Corporation
Keene Corp.
Lac D'Amiante Du Quebec, Ltee.
National Gypsum Company
Owens-Corning Fiberglas Corporation
Pfizer, Inc.
Pittsburgh Corning Corp.
Raymark Industries, Inc.
Rock Wool Manufacturing Co., Inc.
Sprayed Insulation, Inc.
Sprayo-Flake Company
Sprayon Insulation & Acoustics, Inc.
Sprayon Research Corp.
Southern Textile Corp.
The Celotex Corporation
The Flintkote Company
Turner Asbestos Fibres, Ltd.
Turner & Newall Limited
Union Carbide Corp.
Uniroyal, Inc.
United States Gypsum Company
U.S. Mineral Products Co.
W.R. Grace & Co.
Wilkin Insulation Co.
Worben Co., Inc.

The defendants deny that they are liable for any claim asserted by plaintiffs and they intend to pursue numerous affirmative defenses to plaintiffs' claims.

3. The court has not passed upon any of the contentions of the parties. The sending of this Notice is not to be construed as an expression of any opinion by the court about merits of any claims or defenses. The foregoing is only a summary of the contentions of plaintiffs and defendants. The pleadings and other records of this litigation more fully reflect the respective contentions of the parties. You or your counsel may review the pleadings and other papers filed at the Office of the Clerk, United States District Court, 601 Market Street (2nd Floor), Philadelphia, Pennsylvania.

4. On September 28, 1984, this court certified a class action in this proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiff class consists of all elementary and secondary public school districts and non-profit private schools in the United States, more particularly defined as follows:

> All entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public elementary or secondary educational facilities, including entities with religious affiliations, in the United States, to the extent hat such non-profit entities are owned or operated by one or ore non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual

This class certification does not imply a conclusion that any entity within the class was injured as a result of the presence of friable asbestos-containing products in its buildings. This class applies to all claims for compensatory damages and equitable relief and participation in the class

is voluntary. You are automatically a member of the class unless you exclude yourself, as more fully described in paragraph 7.

WHAT YOU MUST DO TO PROTECT YOUR RIGHTS:

5. If you fall within the definition of the class as set forth above, you are automatically a member of the class. The court has determined that the class will be further defined to include the following three subclasses: (1) class members with asbestos-containing ceiling plaster and or fireproofing on structural members, (2) class members with asbestos-containing pipe and boiler insulation, and (3) class members who have other property (not specified in (1) or (2) above) containing asbestos. A given class member may have only ceiling fireproofing material, only pipe and boiler insulation, other asbestos-containing products, or any combination thereof in its buildings.

If you wish to exclude yourself from the class, for whatever reasons, you may elect to do so and you may opt out.

6. If you exclude yourself from the class, you will not be bound by any determination in the class. You will be free to initiate your own independent law suit, but you will not share in any recovery on behalf of the class or any other benefit that may result from the class action litigation.

7. You may exclude yourself from the class only if you request exclusion in writing by signing and mailing the enclosed Exclusion Request to the Clerk, United States District Court for the Eastern District of Pennsylvania, P.O. Box 2179, Philadelphia, PA 19103, no later than midnight, December 1, 1987. The filing of a law suit in your own behalf does not constitute a request for exclusion from the class. Failure to mail such request may preclude you from later being excluded if you so desire.

8. If you do not exclude yourself by December 1, 1987 from the class, you will be bound by any class judgment, whether or not favorable and you may, but need not, enter an appearance in this action through counsel or your choosing. If you choose to enter an appearance through your own legal counsel, you will be liable for the legal fees of your personal counsel. Otherwise, the named plaintiff school districts and their counsel will represent your interests as a member of the class. Class members will not have to personally pay any of the attorneys' fees or cost of counsel whose services benefit this class litigation. To the extent that any monetary recovery is ultimately obtained on behalf of the class, your share of any recovery will be assessed, along with all others, on a pro rata or other fair and equitable basis prior to distribution, for the costs and expenses of this action, including such counsel fees as may be awarded by the court. A list of class counsel is available from the Clerk of Court at the address listed on the Notice of Exclusion.

9. If you wish to remain a member of the class for all purposes, you need do nothing at this stage of the proceedings.

10. At the time of the filing of the complaints in these cases, plaintiffs could not sue Johns-Manville Corporation, its parent Manville Corporation, and certain of their affiliates (collectively "Manville"), Amatex Corp., or Unarco Industries, Inc., because these companies had filed petitions in various United States Bankruptcy Courts. Therefore, four companies that were named in this action, Forty-Eight Insulations, Inc., Standard Insulations, Inc., Huxley Development Corporation and Nicolet, Inc., also filed petitions in United States Bankruptcy Courts. Pursuant to orders of these United States Bankruptcy Courts, the plaintiffs may not sue these companies n this class action proceeding. Since these companies are not defendants in the litigation which is the subject of this Notice, the class

action certification described herein does not apply to these companies.

11. In the Manville bankruptcy proceeding, the Bankruptcy Court ordered that in order to preserve any claim which you may have against Manville for the cost of testing or asbestos abatement action, a separate claim had to be filed on the form provided by Manville in the Manville bankruptcy proceeding in the Southern District of New York. Any action taken by you in the Bankruptcy Court will not affect your rights in this class action. Rather, if you wish to remain a member of the class in the national class action proceeding which has been filed in the United States District Court for the Eastern District of Pennsylvania, you need do nothing at this stage of the proceeding.

12. Requests for changes of address, and inquiries regarding this Notice should be sent to:

Clerk, United States District Court for
– the Eastern District of Pennsylvania
(In re: Asbestos School Litigation,
Master File No. 83-0268)
P.O. Box 2179
601 Market Street - Room 2609
Philadelphia, PA 19103

MICHAEL E. KUNZ
Clerk of Court
U.S. District Court for the
Eastern District of Pennsylvania

Dated: September 21, 1987

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION
THIS DOCUMENT RELATES TO ALL ACTIONS

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION WITH LAC D'AMIANTE DU QUEBEC, LTEE AND SETTLEMENT HEARING

TO: ALL MEMBERS OF THE CLASS IN THE ABOVE CAPTIONED LITIGATION

The purpose of this notice is to advise you:

1. Of the pendency of a settlement of this class action with Lac d'Amiante du Quebec, Ltee (LAQ") in the amount of $1,000,000.

2. Of a settlement hearing to approve this settlement to be held on February 12, 1990.

PLEASE READ THIS NOTICE CAREFULLY. YOUR RIGHTS MAY BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION.

I. Settlement Hearing

1. Pursuant to an order of the United States District Court for the Eastern District of Pennsylvania (the "Court") dated November 22, 1989 a hearing well be held in Court Room 8A of the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania at 9:30 A.M. on February 12, 1990 to determine whether the proposed settlement with LAQ as set forth in the Settlement Agreement dated March 31, 1989 is fair, reasonable, and

adequate and should be approved by the Court and whether LAQ should be dismissed from the class action pursuant to this settlement.

2. This notice is given pursuant to Rule 23 of the Federal Rules of Civil Procedure. This notice is not an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by any party in this litigation. The purpose of this notice is to inform you of the pendency of a proposed settlement with LAQ and of the nights you have with respect to the proposed settlement.

3. Class plaintiffs' counsel recommends Court approval of the proposed settlement with LAQ as fair and reasonable and in the best interest of the members of the class in view of (1) the risks and costs of continuing the litigation as against LAQ, (2) the substantial valuable benefits which will accrue under the terms of the proposed settlement to the class, (3) the favorable total sum of this settlement compared to potential large recoveries from the remaining nonsettling defendants in the litigation, and (4) the favorable total sum of this settlement compared to the potential recovery from LAQ in the litigation.

4. At the Settlement Hearing, any member of the class (as defined in paragraph 7, hereof) may appear in person or through counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the proposed settlement with LAQ. However, no party will be heard in opposition to the proposed settlement and no papers or briefs submitted by any such party will be accepted or considered by the Court unless on or before January 29, 1990 such person (a) files with the Clerk of the United States District Court for the Eastern District of Pennsylvania, United States District Court House, 601 Market Street, Philadelphia, Pennsylvania notice of its intention to appear together with a statement that indicates a basis for such

opposition (b) serves copies thereof and copies of any other papers or briefs it files with the Court, in person or by mail upon each of the following attorneys:

Co-Lead Counsel for Plaintiffs and the Class

David Berger, Esq.
David Berger Attorneys At Law
1622 Locust St.
Philadelphia, PA 19103

Herbert B. Newberg, Esq.
Herbert B. Newberg, Esq., P.C.
227 S. 6th Street, Suite 200
Philadelphia, PA 19106

Counsel for Defendant Lac d'Amiante du Quebec, Ltee.

Frederick B. Lacey, Esq.
LeBoeuf, Lamb, Leiby
& MacRae
520 Madison Ave.
New York, NY 10022

Edward J. Madeira, Jr., Esq.
Pepper, Hamilton & Scheetz
3000 Two Logan Sq.
18th & Arch
Philadelphia, PA 19103

Any member of the class who does not make and serve written objections in the manner provided above shall be deemed to have waived such objections and shall be forever foreclosed from making any objections (by appeal or otherwise) to the proposed settlement. Any member of the class who is satisfied with the proposed settlement with LAQ need not appear at the hearing. Any member of the class who has filed objections to the settlement may, but need not appear at the hearing.

II. Description Of The Litigation

5. Beginning in the calendar year 1983, three class action complaints by various school districts were filed in the Eastern District of Pennsylvania against more than 50 defendants. These complaints have been consolidated into a single action known as "In Re: Asbestos School Litigation, Master File No. 83-0268 (Eastern District of Pennsylvania)". The complaints and the consolidated complaints seek compensatory and punitive damages as well as injunctive relief and allege that defendants should bear the cost of identification, analysis repay removal and replace-

ment of asbestos-containing products used in school buildings. Plaintiffs' theories of liability include theories of negligence, strict liability in tort, intentional tort, breach of warranty, concert of action, and civil conspiracy.

6. LAQ has denied and continues to deny all allegations of wrongdoing, violations of law, or breaches of duty and has asserted and continues to assert (1) that the claims alleged in the litigation have no substance in fact, or law, (2) that it has meritorious defenses to such claims, (3) that it has affirmative defenses that bar such claims, and (4) that LAQ should be dismissed from the litigation.

7. Subsequently, the Court entered Pretrial Order No. 20 dated September 28, 1984 certifying a class pursuant to Federal Rules of Civil Procedure 23(b)(3) consisting of

> All entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(1) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. Section 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public, non-profit elementary or secondary educational facilities, including entities with religious affiliations in the United States, to the extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

The United States Court of Appeals for the Third Circuit on May 1, 1986 upheld the class set forth in the paragraph above and the United States Supreme Court on October 6, 1986 denied defendants' petition for writ of

certiorari seeking review of the Third Circuit's decision affirming a class.

8. The named plaintiffs and their counsel in the course of this litigation have conducted discovery and investigations into the facts of these cases, have made a thorough study of the legal principles applicable to the claims in the litigation and have concluded that a settlement with LAQ in the amount and on the terms hereinafter set forth is fair, reasonable and adequate and is in the best interest of the class.

9. LAQ has agreed to enter into a settlement agreement to avoid further expense, inconvenience and the distraction of expensive, burdensome and protracted litigation, and to obtain total and final peace, satisfaction and protection from the class's claims. The proposed settlement and this notice are not to be construed as admissions of liability of any kind whatsoever by LAQ.

III. Summary Of The Settlement And Release

10. LAQ has created a settlement fund in the amount of $1,000,000, exclusive of interest, for the class described in paragraph 7 above.

11. The fund established pursuant to the proposed settlement is being maintained in full on an interest bearing basis, subject only to such deductions or expenditures as are expressly provided in the agreement and approved or otherwise ordered by the Court. The fund with accrued interest is to be distributed to class members or otherwise as the Court may direct upon final judicial approval of the proposed settlement, or at the conclusion of this litigation, or is to be returned to LAQ in the event that this proposed settlement fails to obtain final judicial approval or is not fully consummated and effected. Notice is expressly given that subject to approval of the Court, the fund may be disbursed in part to defray the cost of the litigation, in-

cluding such reasonable attorneys fees as may be awarded by the Court.

12. Subject to Court approval, the plaintiffs and Co-Lead Counsel and the class shall be reimbursed and idemnified out of the fund for all expenses and costs related to this notice and incurred in the administration of the fund.

13. Except with respect to the expense of notice or as otherwise expressly permitted by provisions of the settlement agreement and by the Court, or otherwise ordered by the Court, no distribution of the fund is to be made until there has been a final judicial approval of the proposed settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, a final judgment has been entered dismissing the claims of all plaintiffs and all members of the class against LAQ and an Order of the Court allowing such distribution has been entered.

14. UPON THE ENTRY OF FINAL JUDICIAL APPROVAL OF THE PROPOSED SETTLEMENT, EACH MEMBER OF THE CLASS SHALL BE DEEMED TO HAVE CONSTRUCTIVELY RELEASED ALL CLAIMS AGAINST LAQ AS IF IT HAD INDIVIDUALLY EXECUTED A RELEASE AND COVENANT NOT TO SUE IN THE FORM OF EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN.

15. Under the terms of the proposed settlement, the class shall reduce any judgment it obtains against any defendant by the amount percentage or share of such judgment attributable to LAQ so as to bar, discharge and release under applicable law any claims for contribution or indemnity against LAQ arising from or related to the claims. In the event that the class obtains a judgment (including pursuant to a settlement agreement) against one or more defendants in the Litigation and any of those defendants obtains a judgment over, in whole or in part, against LAQ for contribution or indemnity, then the class will be required to reduce or remit any judgment or por-

tions thereof obtained from those defendants by the amount of the judgment over against LAQ.

IV. Reserved Rights of Settling Defendants And Of Class Members

16. THE CLASS EXPRESSLY RESERVES ALL ITS RIGHTS AND CLAIMS AGAINST ALL NONSETTLING DEFENDANTS. THE SETTLEMENT AGREEMENT AND ANY COVENANT WHICH IS EXECUTED PURSUANT THERETO IS *NOT* INTENDED AND IS *NOT* TO BE CONSTRUED AS A RELEASE OR DISMISSAL BY THE CLASS OF ANY CLAIMS OR RIGHTS AGAINST ANY NONSETTLING DEFENDANTS.

V. Examination of Papers

17. The summary of certain provisions of the settlement agreement and of the proposed settlement embodied thereof is not intended, and should not be construed, as a complete statement of the agreement or of the litigation. For a more detailed statement of the matters involved in the litigation, including the terms of the agreement, you are referred to papers on file under the caption *In re: Asbestos School Litigation*, Master File No. 83-0268 which may be inspected during regular business hours at the office of the Clerk of the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Philadelphia, Pennsylvania 19106.

If you have any questions about this notice please write to one of the class counsel identified in paragraph 4. PLEASE DO NOT DIRECT QUESTIONS TO THE COURT OR THE CLERK'S OFFICE.

VI.
Provisions for Attorneys' Fees and Expenses

18. Upon the Court's approval of the proposed settlement, counsel for class plaintiffs may apply to the Court

for an award of attorneys fees and expenses incurred in the prosecution of the litigation to be drawn from the settlement fund. Class plaintiffs may also apply to the Court for use of some or all of such an award to cover the cost of class plaintiffs proceeding with the litigation as against all of the other defendants who have not settled. In any event, any awards and the use to be made of such awards will be determined by the Court upon application of the class plaintiffs'.

MICHAEL E. KUNZ
Clerk Of Court
United States District Court
For The Eastern District
Of Pennsylvania

EXHIBIT A
GENERAL RELEASE AND COVENANT NOT TO SUE

KNOW ALL MEN BY THESE PRESENTS, that Named Plaintiffs in the Litigation *In re: Asbestos School Litigation*, No. 83-0268 (E.D. Pa. filed July 27, 1983) (the "Litigation"), the School District of Lancaster, the Manheim School District, the Lampeter-Strasburg School District, the Barnwell School District No. 45, the Board of Education of the Memphis City Schools and the Napa Valley Unified School District ("Named Plaintiffs") and all members, individually and collectively, of the Rule 23(b)(3) class certified in Order No. 20 (entered September 28, 1984) that have not filed timely and valid exclusion elections (the "Class"), individually and collectively, on behalf of themselves and their predecessors, successors and assigns, intending to be legally bound hereby, for good and valuable consideration, the receipt of which is hereby acknowledged, do hereby absolutely, fully and forever release, relieve, remise and discharge Lac d'Amiante du Quebec, Ltee, its predecessors (including Lake Asbestos of

Quebec, Ltd.) and successors, and past and present assigns, representatives, subsidiaries, divisions, affiliates, parents (and subsidiaries thereof), partnerships and partners, and all of their officers, directors, agents, employees, and attorneys, both past and present ("LAQ"), of and from any and all manner of claims, demands, rights or causes of action (including all claims for punitive damages, costs, expenses or fees), present or future, known or unknown, which the Named Plaintiffs and Class, individually and collectively, had, now had, or hereinafter can, shall, or may have against LAQ from the beginning of the world in connection with, arising out of, based in whole or in part on, or in any way related to facts, matters, acts of commission or omission, statements, agreements or occurrences which were or could have been alleged, described, embraced or otherwise referred to in any of the complaints and amended complaints ("Claims") in all the individual and class actions known as *In re: Asbestos School Litigation* filed in the United States District Court for the Eastern District of Pennsylvania and assigned the Master File No. 83-0268 (E.D. Pa.), including, but not limited to the actions filed by the Named Plaintiffs against, *inter alia*, Lac d'Amiante du Quebec, Ltee (formerly known as Lake Asbestos of Quebec, Ltd.).

Named Plaintiffs and the Class hereby certify that they have made this compromised settlement and executed this Release with the understanding that they are giving up every right that they now have, ever had or may ever have against LAQ, by reason of the injuries, property damages and monetary damages allegedly sustained now or in the future as a result of the presence of asbestos and asbestos-containing products in their buildings.

Named Plaintiffs and the Class covenant and agree not to institute, maintain, collect or proceed against LAQ on any Claims that arise out of, relate to or are based upon, in whole or in part, any subject or matter covered by the release describing in the paragraph above.

Named Plaintiffs and the Class accept and assume the risk that if any fact or circumstance is found, suspected, or claimed hereafter to be other than or different from the facts or circumstances now believed to be true, the general release and covenant not to sue contained herein shall be and remain effective notwithstanding any such difference in any such facts or circumstances.

IN WITNESS WHEREOF, Named Plaintiffs and the Class have caused the undersigned, who are authorized to execute this General Release and Covenant Not to Sue on their behalf, to set forth their hand and seal on behalf of the Named Plaintiffs and Class.

HERBERT B. NEWBERG DAVID BERGER

Co-Lead Counsel for Plaintiffs and the Class

Dated: December 28, 1989